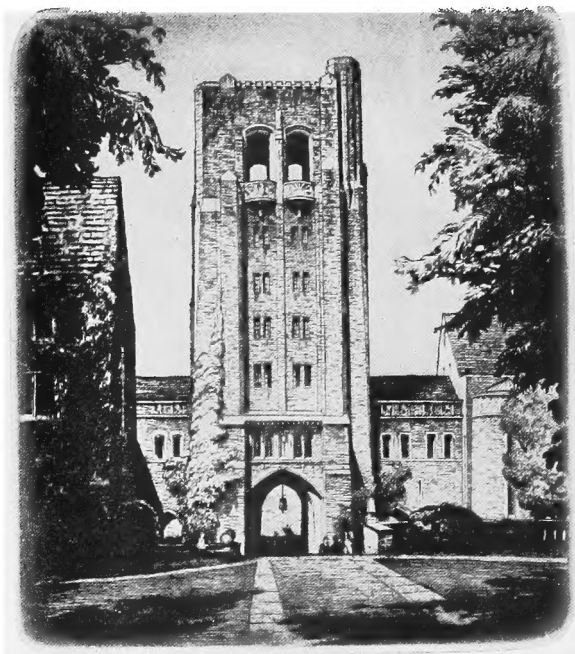


GEO. T. BISEL CO.
LAW PUBLISHERS
AND STATIONERS.
724 SANSON STREET.
PHILADELPHIA.

KF
974
B69
T7



Cornell Law School Library

Cornell University Library

KF 974.B69T7

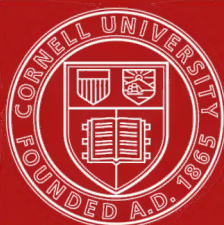
v.1

A treatise on the modern law of banking



3 1924 018 849 731

law



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

A TREATISE
ON THE
MODERN
LAW OF BANKING

BY

ALBERT S. BOLLES, Ph. D., LL. D.

AUTHOR OF BANKS AND THEIR DEPOSITORS; BANK OFFICERS; BANK
COLLECTIONS; THE NATIONAL BANK ACT AND ITS JUDICIAL IN-
TERPRETATION; PRACTICAL BANKING; LECTURER ON COMMERCIAL
LAW AND BANKING IN HAVERFORD COLLEGE.

VOL. I.

PHILADELPHIA
THE GEORGE T. BISEL COMPANY,
LAW PUBLISHERS AND BOOKSELLERS

1907

B79300

COPYRIGHT 1907

BY

THE GEORGE T. BISEL COMPANY.

TO

THE HON. S. LESLIE MESTREZAT,

ASSOCIATE JUSTICE OF THE SUPREME COURT OF PENNSYLVANIA

THIS WORK IS DEDICATED AS A MARK OF THE AUTHOR'S REGARD FOR HIS
JUDICIAL ATTAINMENTS AND HIS FRIENDSHIP.

PREFACE

FORMERLY, a legal treatise on a branch of the law was a digest improved by a more orderly arrangement of principles. There was not much in the way of criticism; occasionally an author would dare to fill in a gap with a proposed rule of his own. Story especially, with his great learning and high judicial position, dared venture much further in this direction than any of his predecessors, drawing largely from the rich mine of the civil law, of which he was a diligent and admiring student. The stream of judicial decision rapidly widened and soon overflowed in many diverse directions. Subsequent authors rarely went far in criticising the diversities, contenting themselves with a presentation of the varying, discordant scene, and leaving the reader to find his way to safe ground quite by himself.

In consequence of the rapidly rising flood of cases much more than this is required of the legal writer to-day. All the principles pertaining to his subject with their modifications should be presented in an orderly manner. And when different views are set forth about a principle and compete for wider judicial recognition, not only should these clearly appear, upheld by their respective authorities; but, if possible, the stronger or better rule, or one more adequately sustained by reason and authority should be given. As many common law principles have been superseded or modified by statute, these changes ought also to appear that the truth may be known and delusion avoided. How far the author of this work has succeeded in accomplishing these purposes others will judge. Happy will he be should that judgment justify his undertaking.

Since the text of this work was in type, Illinois has overthrown the rule, that the delivery of a check has the effect of assigning the deposit on which it was drawn to the holder. As Illinois is the birthplace of the rule, its complete extinc-

tion in other states will doubtless soon follow. Since experience has clearly proved its unsoundness, would not a more satisfying result have followed if the departure had been less radical? Had the court in *Munn v. Birch* decided that the giving and delivery of a check for value worked an assignment after its presentation for payment, it would have been in harmony with the rule that is now grounded in the jurisprudence of many states, that a third party to a contract, made for his benefit, supported by an adequate consideration may be enforced by him, even though he be a stranger.

A word may be added concerning the author's use of cases. On fundamental principles no attempt has been made to cite all of them, for obvious reasons. In support of principles not so well established, the author has sought to glean from every source. This is the explanation for the use of many minor authorities.

In the citation of so many cases some errors could hardly be avoided. All that are likely to mislead are given in a note on page x. Some slighter errors which, it is believed, will not mislead any one, have not been noticed.

Though the judicial interpretation of the National Bank Act has been fully treated in this work, the inclusion of the Act itself is by the advice of legal friends and bankers, whose judgment the author deemed too weighty to disregard.

A. S. B.

CONTENTS

CHAPTER I.	PAGE
Nature and Organization of a Bank.....	1
CHAPTER II.	
Reorganization, Supervision and Reports	32
CHAPTER III.	
Regulations and Usage	43
CHAPTER IV.	
Rights of Stockholders	57
CHAPTER V.	
Liabilities of Stockholders	108
CHAPTER VI.	
Authority to Receive Deposits	179
CHAPTER VII.	
Authority to Make Loans	196
CHAPTER VIII.	
Authority, Duty and Liability of Directors	257
CHAPTER IX.	
Managing Officers	311
CHAPTER X.	
Authority and Liability of Minor Officers and Special Agents.....	380
CHAPTER XI.	
Imputation of Knowledge Acquired by Officers to their Bank.....	391

CHAPTER XII.	
Personal and Double Agency Transactions.....	406
CHAPTER XIII.	
Kinds and Keeping of Deposits	429
CHAPTER XIV.	
Certificates of Deposit	454
CHAPTER XV.	
Entries and Pass-Books	466
CHAPTER XVI.	
Ownership of Deposits	478
CHAPTER XVII.	
COLLECTIONS.	
DIVISION 1.	
Contract With Depositor	509
DIVISION 2.	
Ownership of Paper Deposited for Collection	519
CHAPTER XVIII.	
Mode of Making Collections	537
CHAPTER XIX.	
Relation Between the Collecting Agency, Sub-Agency and Depositor..	575
CHAPTER XX.	
Leading Principles Concerning the Payment of Deposits	583
CHAPTER XXI.	
Payment of Savings Bank Deposits.....	638
CHAPTER XXII.	
Payment of Gifts	659
CHAPTER XXIII.	
Certification	696

CHAPTER XXIV.	
Payment of Forged Paper	711
CHAPTER XXV.	
Lien and Set Off	740
CHAPTER XXVI.	
Payment of Depositor's Notes	752
CHAPTER XXVII.	
Actions	765
CHAPTER XXVIII.	
Attachment	776
CHAPTER XXIX.	
Dissolution and Its Effect	792
CHAPTER XXX.	
Appointment and Authority of Liquidating Officers	811
CHAPTER XXXI.	
Presentation and Adjustment of Claims	838
CHAPTER XXXII.	
Payment of Dividends	868
CHAPTER XXXIII.	
Forfeiture and Repeal of Charter	874

ERRATA

- Page 18, 4th line from bottom, substitute 95 *for* 15.
Page 146, 2d line from top, *for* subsequent, *read* former.
Page 165, 6th line from bottom, *for* 169 Cal. 116, *read* 116 Cal. 169.
Page 239, 19th line from bottom, *for* note 2, *read* note 97, and in 17th line *for* note 1, *read* note 96.
Page 294, put the Mo. cases under the minor rule of liability.
Page 299, 23d line from bottom, *for* 39, *read* 89.
Page 307, 6th line from bottom, *substitute* xvi, *for* xiii.
Page 470, for references to notes 21 and 22, *add* Leather Manuf. Bank v. Morgan, 117 N. S. 96; Allen v. First Nat. Bank, 100 Ala. 476, 485.
Page 527, 18th line from top, *for* drawer, *read* drawee and in the next line *for* drawee *read* drawer.
Page 586, 14th line from bottom, *for* 22 Wend. 73, *read* 23 Wend. 71.
Page 813, 4th line from top, *add* superior figure 12.
Page 865, 8th line from bottom, after note 60, *add* Myers v. Campbell, 64 N. J. Law. 186.

THE NATIONAL BANK ACT AND AMENDMENTS.

DIVISION I.

ORGANIZATION AND POWERS.

- | | |
|--|--|
| 1. Articles of association. | 17. Oaths of directors. |
| 2. Organization certificate. | 18. Failure to hold annual election. |
| 3. Execution of organization certificate. | 19. Vacancies in board of directors. |
| 4. Corporate powers. | 20. President shall be a director. |
| 5. Holding of real estate. | 21. Organization of gold banks. |
| 6. Amount of capital stock required. | 22. Conversion of gold banks. |
| 7. Shares of stock. | 23. Conversion of State banks. |
| 8. Payment of capital stock. | 24. Capital of State banks. |
| 9. Enforcing payment of capital. | 25. Converted banks may retain branches. |
| 10. Examination of organization proceedings. | 26. Personal liability of shareholders. |
| 11. Deposit of United States bonds. | 27. Exception for trustees, etc. |
| 12. Comptroller's certificate of authority. | 28. Increase of capital stock. |
| 13. Publication of certificate of authority. | 29. When increase becomes valid. |
| 14. Number and election of directors. | 30. Reduction of capital stock. |
| 15. Qualifications of directors. | 31. Change of title and location. |
| 16. Qualifications of voters at elections. | 32. Status of national banks organized under the act of February 25, 1863. |
| | 33. Prohibition of corporation contributions to political elections. |

1. Articles of Association.

Associations for carrying on the business of banking under this Title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association

may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office. (U. S. Rev. Stat. § 5133.)

2. Organization Certificate.

The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state—

First. *Title*.—The name assumed by such association; which name shall be subject to the approval of the Comptroller of the Currency.

Second. *Location*.—The place where its operations of discount and deposit are to be carried on, designating the state, territory, or district, and the particular county and city, town, or village.

Third. *Capital stock*.—The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. *Shareholders*.—The names and places of residence of the shareholders and the number of shares held by each of them.

Fifth. *Object of certificate*.—The fact that the certificate is made to enable such persons to avail themselves of the advantages of this Title. (Rev. Stat. § 5134.)

3. Execution of Organization Certificate.

The organization certificate shall be acknowledged before a judge of some court of record or notary public, and shall be, together with the acknowledgment thereof, authenticated by the seal of such court or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office. (Rev. Stat. § 5135.)

4. Corporate Powers.

Upon duly making and filing articles of association and an organization certificate, the association shall become, as from

the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

First. *Seal*.—To adopt and use a corporate seal.

Second. *Term of existence*.—To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

Third. *Contracts*.—To make contracts.

Fourth. *Suits*.—To sue and be sued, complain and defend, in any court of law and [or] equity, as fully as natural persons.

Fifth. *Officers*.—To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. *By-laws*.—To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. *Incidental powers*.—To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title; but no association shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the

Comptroller of the Currency to commence the business of banking. (Rev. Stat. § 5136.)

5. Holding of Real Estate.

A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years. (Rev. Stat. § 5137.)

6. Amount of Capital Stock Required.

No association shall be organized with a less capital than one hundred thousand dollars, except that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants, and except that banks with a capital of not less than twenty-five thousand dollars may, with the sanction of the Secretary of the Treasury, be organized in any place the population of which does not exceed three thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than two hundred thousand dollars. (Rev. Stat. § 5138, as amended by act of March 14, 1900.)

7. Shares of Stock.

The capital stock of each association shall be divided into

shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association of a national bank by which the rights, remedies, or security of the existing creditors of the association shall be impaired. (Rev. Stat. § 5139.)

8. Payment of Capital Stock.

At least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in installments of at least ten per centum each, on the whole amount of the capital, as frequently as one installment at the end of each succeeding month from the time it shall be authorized by the Comptroller of the Currency to commence business; and the payment of each installment shall be certified to the Comptroller, under oath, by the president or cashier of the association. (Rev. Stat. § 5140.)

9. Enforcing Payment of Capital.

Whenever any shareholder, or his assignee, fails to pay any installment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon

to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be canceled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association. (Rev. Stat. § 5141.)

10. Examination of Organization Proceedings.

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this Title, and the association transmitting the same notifies the Comptroller that at least fifty per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this Title required to be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this Title required to entitle it to engage in the business of banking. And shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence the business of banking. (Rev. Stat. § 5168.)

11. Deposit of United States Bonds.

Every association, after having complied with the provisions

of this Title, preliminary to the commencement of the banking business, and before it shall be authorized to commence banking business under this Title, shall transfer and deliver to the Treasurer of the United States, as security for its circulating notes, any United States registered bonds bearing interest, to an amount where the capital is one hundred and fifty thousand dollars or less, of not less than one-fourth of the capital, and fifty thousand dollars where the capital is in excess of one hundred and fifty thousand dollars. (Rev. Stat. § 5159, as amended by § 8 of the act of July 12, 1882.)

12. Comptroller's Certificate of Authority.

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the Comptroller may withhold from an association his certificate authorizing the commencement of business whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this Title. (Rev. Stat. § 5169.)

13. Publication of Certificate of Authority.

The association shall cause the certificate issued under the preceding section to be published in some newspaper printed in the city or county where the association is located, for at least sixty days next after the issuing thereof; or, if no newspaper is published in such city or county, then in the newspaper published nearest thereto. (Rev. Stat. § 5170.)

14. Number and Election of Directors.

The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders at a meeting to be held at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking, and afterward at meetings to be held on such day in January of each year as is specified therefor in the articles of association. The directors shall hold office for one year, and until their successors are elected and have qualified. (Rev. Stat. § 5145.)

15. Qualifications of Directors.

Every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the state, territory, or district in which the association is located for at least one year immediately preceding their election, and must be residents therein during their continuance in office. Every director must own in his own right at least ten shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of ten shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place. (Rev. Stat. § 5146.)

16. Qualifications of Voters at Elections.

In all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or bookkeeper of such association shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote. (Rev. Stat. § 5144.)

17. Oaths of Directors.

Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not

knowingly violate, or willingly permit to be violated, any of the provisions of this Title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this Title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated or in any way pledged as security for any loan or debt. Such oath, subscribed by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his office. (Rev. Stat. § 5147.)

18. Failure to Hold Annual Election.

If, from any cause, an election of directors is not made at the time appointed, the association shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days' notice thereof in all cases having been given in a newspaper published in the city, town, or county in which the association is located; and if no newspaper is published in such city, town, or county such notice shall be published in a newspaper published nearest thereto. If the articles of association do not fix the day on which the election shall be held, or if no election is held on the day fixed, the day for the election shall be designated by the board of directors in their by-laws, or otherwise; or if the directors fail to fix the day, shareholders representing two-thirds of the shares may do so. (Rev. Stat. § 5149.)

19. Vacancies in Board of Directors.

Any vacancy in the board shall be filled by appointment by the remaining directors, and any director so appointed shall hold his place until the next election. (Rev. Stat. § 5148.)

20. President Shall be a Director.

One of the directors, to be chosen by the board, shall be the president of the board. (Rev. Stat. § 5150.)

21. Organization of Gold Banks.

Associations may be organized in the manner prescribed by

this Title for the purpose of issuing notes payable in gold. (Rev. Stat. § 5185.)

22. Conversion of Gold Banks.

Any national gold bank organized under the provisions of the laws of the United States may, in the manner and subject to the provisions prescribed by section fifty-one hundred and fifty-four of the Revised Statutes of the United States, for the conversion of banks incorporated under the laws of any state, cease to be a gold bank and become such an association as is authorized by section fifty-one hundred and thirty-three, for carrying on the business of banking, and shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are by law prescribed for such associations: *Provided*, That all certificates of organization which shall be issued under this act shall bear the date of the original organization of each bank respectively as a gold bank. (Act of February 14, 1880.)

23. Conversion of State Banks.

Any bank incorporated by special law, or any banking institution organized under a general law of any state, may become a national association under this Title by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate may be executed by a majority of the directors of the bank or banking institution; and the certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change and convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and organization certificate, shall have power to execute all other papers, and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be the directors of the association until

others are elected or appointed in accordance with the provisions of this chapter; and any state bank which is a stockholder in any other bank, by authority of state laws, may continue to hold its stock, although either bank, or both, may be organized under and have accepted the provisions of this Title. When the Comptroller of the Currency has given to such association a certificate, under his hand and official seal, that the provisions of this Title have been complied with, and that it is authorized to commence the business of banking, the association shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are prescribed for other associations, originally organized as national banking associations, and shall be held and regarded as such an association. But no such association shall have a less capital than the amount prescribed for associations organized under this Title. (Rev. Stat. § 5154.)

24. Capital of State Banks.

The capital of any state bank or banking association which has ceased or shall cease to exist, or which has been or shall be converted into a national bank, shall be assumed to be the capital as it existed immediately before such bank ceased to exist or was converted as aforesaid. (Rev. Stat. § 3410.)

25. Converted Banks May Retain Branches.

It shall be lawful for any bank or banking association, organized under state laws and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws and to retain and keep in operation its branches, or such one or more of them as it may elect to retain, the amount of the circulation redeemable at the mother bank and each branch to be regulated by the amount of capital assigned to and used by each. (Rev. Stat. § 5155.)

26. Personal Liability of Shareholders.

The shareholders of every national banking association shall

be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares, except that shareholders of any banking association now existing under state laws having not less than five millions of dollars of capital actually paid in and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this Title and if at any time there is a deficiency in such surplus of twenty per centum such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of chapter four of this Title. (Rev. Stat. § 5151.)

27. Exception for Trustees, etc.

Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be if living and competent to act and hold the stock in his own name. (Rev. Stat. § 5152.)

28. Increase of Capital Stock.

Any association formed under this Title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this Title. But the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency. (Rev. Stat. § 5142.)

Any national banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders

owning two-thirds of the stock of such association, increase its capital stock, in accordance with existing laws, to any sum approved by the said Comptroller, notwithstanding the limit fixed in its original articles of association and determined by said Comptroller; and no increase of the capital stock of any national banking association either within or beyond the limit fixed in its original articles of association shall be made except in the manner herein provided. (§ 1, Act of May 1, 1886.)

29. When Increase Becomes Valid.

And no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association. (Rev. Stat. § 5142.)

30. Reduction of Capital Stock.

Any association formed under this Title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this Title to authorize the formation of associations, but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained. (Rev. Stat. § 5143.)

31. Change of Title and Location.

The act of May 1, 1886, provides: That any national banking association may change its name or the place where its operations of discount and deposit are to be carried on to any other place within the same state, not more than thirty miles distant, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such

association. A duly authenticated notice of the vote and of the new name or location selected shall be sent to the office of the Comptroller of the Currency, but no change of name or location shall be valid until the Comptroller shall have issued his certificate of approval of the same. (§ 2.)

That all debts, liabilities, rights, provisions, and powers of the association under its old name shall devolve upon and inure to the association under its new name. (§ 3.)

That nothing in this act contained shall be so construed as in any manner to release any national banking association under its old name or at its old location from any liability, or affect any action or proceeding in law in which said association may be or become a party or interested. (§ 4.)

32. Status of National Banks Organized Under the Act of February 25, 1863.

That nothing in this Title shall affect any appointments made, acts done, or proceedings had or commenced prior to the third day of June, eighteen hundred and sixty-four, in or toward the organization of any national banking association under the act of February twenty-five, eighteen hundred and sixty-three; but all associations which on the third day of June, eighteen hundred and sixty-four, were organized or commenced to be organized under that act shall enjoy all the rights and privileges granted, and be subject to all the duties, liabilities, and restrictions imposed by this Title, notwithstanding all the steps prescribed by this Title for the organization of associations were not pursued, if such associations were duly organized under that act. (Rev. Stat. § 5156.)

33. Prohibition of Corporation Contributions to Political Elections.

It shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors

or a Representative in Congress is to be voted for or any election by any state legislature of a United States Senator. Every corporation which shall make any contribution in violation of the foregoing provisions shall be subject to a fine not exceeding \$5,000, and every officer or director of any corporation who shall consent to any contribution by the corporation in violation of the foregoing provisions shall upon conviction be punished by a fine of not exceeding \$1,000 and not less than \$250, or by imprisonment for a term of not more than one year, or both such fine and imprisonment in the discretion of the court. (Act of Jan. 26, 1907.)

DIVISION II.

BANK CIRCULATION.

- | | |
|--|---|
| 1. United States bonds defined. | 18. Worn-out or mutilated circulation. |
| 2. Security for circulation. | 19. Provisions for redeeming circulation. |
| 3. Relation of bond deposit to capital. | 20. Withdrawing circulation. |
| 4. Exchange of bonds. | 21. General provisions for withdrawing circulation. |
| 5. Bonds held by treasurer. | 22. Circulation of extended banks. |
| 6. Record of bond transfers. | 23. Circulation of liquidating banks. |
| 7. Notice of transfer. | 24. Circulation of closed banks. |
| 8. Examination of bonds and records. | 25. Regulations for redemption records. |
| 9. Annual examination of bonds. | 26. Redeemed notes to be canceled. |
| 10. General provisions respecting bonds. | 27. Redemption in United States notes. |
| 11. Amount of circulation obtainable. | 28. Disposition of redemption account. |
| 12. Preparation of bank circulation. | 29. Redemption of incomplete circulation. |
| 13. Circulation shall bear charter number. | 30. Banks take circulation at par. |
| 14. Control of plates and dies. | 31. Issue of other notes prohibited. |
| 15. Examination of plates and dies. | 32. Fraudulent notes to be marked. |
| 16. Circulation, for what receivable. | |
| 17. Circulation of gold banks. | |

1. United States Bonds Defined.

The term "United States bonds," as used throughout this chapter, shall be construed to mean registered bonds of the United States. (Rev. Stat. § 5158.)

2. Security for Circulation.

Every association, after having complied with the provisions of this Title, preliminary to the commencement of the banking business, and before it shall be authorized to commence banking business under this Title, shall transfer and deliver to the Treasurer of the United States any United States registered bonds, bearing interest, to an amount not less than one-fourth of the capital, the capital being \$150,000 or less, as security for their circulating notes. Such bonds shall be received by the Treasurer upon deposit and shall be by him safely kept in his office until they shall be otherwise disposed of in pursuance of the provisions of this Title. (Rev. Stat. § 5159, as amended by § 8, act of July 12, 1882.)

By § 4, of the act of June 20, 1874, any association organized under this act, or any of the acts of which this is an amendment, desiring to withdraw its circulating notes, in whole or in part, may, upon the deposit of lawful money with the Treasurer of the United States in sums of not less than nine thousand dollars, take up the bonds which said association has on deposit with the Treasurer for the security of such circulating notes; which bonds shall be assigned to the bank in the manner specified in the nineteenth section of the national bank act; and the outstanding notes of said association, to an amount equal to the legal tender notes deposited, shall be redeemed at the Treasury of the United States, and destroyed as now provided by law: *Provided*, That the amount of the bonds on deposit for circulation shall not be reduced below \$50,000.

By § 8, of the act of July 12, 1882, national banks now organized or hereafter organized, having a capital of \$150,000, or less, shall not be required to keep on deposit with the Treasurer of the United States bonds in excess of one-fourth of their capital stock as security for their circulating notes; but such banks shall keep on deposit or deposit with the Treasurer of the United States the amount of bonds as herein required. And such of those banks having on deposit bonds in excess of

that amount are authorized to reduce their circulation by the deposit of lawful money as provided by law: *Provided*, That the amount of such circulating notes shall not in any case exceed ninety per centum of the par value of the bonds deposited as herein provided: *Provided further*, That the national banks which shall hereafter make deposits of lawful money for the retirement in full of their circulation shall at the time of their deposit be assessed for the cost of transporting and redeeming their notes then outstanding, a sum equal to the average cost of the redemption of national bank notes during the preceding year, and shall thereupon pay such assessment. And all national banks which have heretofore made or shall hereafter make deposits of lawful money for the reduction of their circulation shall be assessed and shall pay an assessment in the manner specified in section 3, of the act approved June 20, 1874, for the cost of transporting and redeeming their notes redeemed from such deposit subsequently to June 30, 1881.

3. Relation of Bond Deposit to Capital.

The deposit of bonds made by each association shall be increased as its capital may be paid up or increased, so that every association shall at all times have on deposit with the Treasurer registered United States bonds to the amount required by law. And any association that may desire to reduce its capital or close up its business and dissolve its organization may take up its bonds upon returning to the Comptroller its circulating notes in the proportion hereinafter required, or may take up any excess of bonds beyond the amount required by law, and upon which no circulating notes have been delivered. (Rev. Stat. § 5160.)

4. Exchange of Bonds.

To facilitate a compliance with the two preceding sections, the Secretary of the Treasury is authorized to receive from any association, and cancel, any United States coupon bonds, and to issue in lieu thereof registered bonds of like amount, bearing

a like rate of interest, and having the same time to run. (Rev. Stat. § 5161.)

5. Bonds Held by Treasurer.

All transfers of United States bonds made by any association under the provisions of this Title shall be made to the Treasurer of the United States in trust for the association, with a memorandum written or printed on each bond, and signed by the cashier, or some other officer of the association making the deposit. A receipt shall be given to the association, by the Comptroller of the Currency, or by a clerk appointed by him for that purpose, stating that the bond is held in trust for the association on whose behalf the transfer is made, and as security for the redemption and payment of any circulating notes that have been or may be delivered to such association. No assignment or transfer of any such bond by the Treasurer shall be deemed valid unless countersigned by the Comptroller of the Currency. (Rev. Stat. § 5162.)

6. Record of Bond Transfers.

The Comptroller of the Currency shall keep in his office a book in which he shall cause to be entered, immediately upon countersigning it, every transfer or assignment by the Treasurer, of any bonds belonging to a national banking association, presented for his signature. He shall state in such entry the name of the association from whose account the transfer is made, the name of the party to whom it is made, and the par value of the bonds transferred. (Rev. Stat. § 5163.)

7. Notice of Transfer.

The Comptroller of the Currency shall, immediately upon countersigning and entering any transfer or assignment by the Treasurer of any bonds belonging to a national banking association, advise by mail the association from whose accounts the transfer is made of the kind and numerical designation of the bonds and the amount thereof so transferred. (Rev. Stat. § 5164.)

8. Examination of Bonds and Records.

The Comptroller of the Currency shall have at all times, during office hours, access to the books of the Treasurer of the United States for the purpose of ascertaining the correctness of any transfer or assignment of the bonds deposited by an association, presented to the Comptroller to countersign; and the Treasurer shall have the like access to the book mentioned in section fifty-one hundred and sixty-three, during office hours, to ascertain the correctness of the entries in the same; and the Comptroller shall also at all times have access to the bonds on deposit with the Treasurer to ascertain their amount and condition. (Rev. Stat. § 5165.)

9. Annual Examination of Bonds.

Every association having bonds deposited in the office of the Treasurer of the United States shall, once or oftener in each fiscal year, examine and compare the bonds pledged by the association with the books of the Comptroller of the Currency and with the accounts of the association, and, if they are found correct, to execute to the Treasurer a certificate setting forth the different kinds and the amounts thereof, and that the same are in the possession and custody of the Treasurer at the date of the certificate. Such examination shall be made at such time or times during the ordinary business hours as the Treasurer and the Comptroller, respectively, may select, and may be made by an officer or agent of such association, duly appointed in writing for that purpose; and his certificate before mentioned shall be of like force and validity as if executed by the president or cashier. A duplicate of such certificate, signed by the Treasurer, shall be retained by the association. (Rev. Stat. § 5166.)

10. General Provisions Respecting Bonds.

The bonds transferred to and deposited with the Treasurer of the United States by any association for the security of its circulating notes shall be held exclusively for that purpose until such notes are redeemed, except as provided in this Title.

The Comptroller of the Currency shall give to any such association powers of attorney to receive and appropriate to its own use the interest on the bonds which it has so transferred to the Treasurer; but such powers shall become inoperative whenever such association fails to redeem its circulating notes. Whenever the market or cash value of any bonds thus deposited with the Treasurer is reduced below the amount of the circulation issued for the same the Comptroller may demand and receive the amount of such depreciation in other United States bonds at cash value, or in money, from the association, to be deposited with the Treasurer as long as such depreciation continues. And the Comptroller, upon the terms prescribed by the Secretary of the Treasury, may permit an exchange to be made of any of the bonds deposited with the Treasurer by any association for other bonds of the United States authorized to be received as security for circulating notes if he is of opinion that such an exchange can be made without prejudice to the United States; and he may direct the return of any bonds to the association which transferred the same, in sums of not less than one thousand dollars, upon the surrender to him and the cancellation of a proportionate amount of such circulating notes: *Provided*, That the remaining bonds which shall have been transferred by the association offering to surrender circulating notes are equal to the amount required for the circulating notes not surrendered by such association, and that the amount of bonds in the hands of the Treasurer is not diminished below the amount required to be kept on deposit with him, and that there has been no failure by the association to redeem its circulating notes, nor any other violation by it of the provisions of this Title, and that the market or cash value of the remaining bonds is not below the amount required for the circulation issued for the same. (Rev. Stat. § 5167.)

11. Amount of Circulation Obtainable.

That upon the deposit with the Treasurer of the United States, by any national banking association, of any bonds of the United States in the manner provided by existing law, such

association shall be entitled to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited; and any national banking association now having bonds on deposit for the security of circulating notes, and upon which an amount of circulating notes has been issued less than the par value of the bonds shall be entitled, upon due application to the Comptroller of the Currency, to receive additional circulating notes in blank to an amount which will increase the circulating notes held by such association to the par value of the bonds deposited, such additional notes to be held and treated in the same way as circulating notes of national banking associations heretofore issued, and subject to all the provisions of law affecting such notes: *Provided*, That nothing herein contained shall be construed to modify or repeal the provisions of section fifty-one hundred and sixty-seven of the Revised Statutes of the United States, authorizing the Comptroller of the Currency to require additional deposits of bonds or of lawful money in case the market value of the bonds held to secure the circulating notes shall fall below the par value of the circulating notes outstanding for which such bonds may be deposited as security: *And provided further*, That the circulating notes furnished to national banking associations under the provisions of this Act shall be of the denominations prescribed by law, except that no national banking association shall, after the passage of this Act, be entitled to receive from the Comptroller of the Currency, or to issue or reissue or place in circulation, more than one-third in amount of its circulating notes of the denomination of five dollars: *And provided further*, That the total amount of such notes issued to any such association may equal at any time but shall not exceed the amount at such time of its capital stock actually paid in: *And provided further*, That under regulations to be prescribed by the Secretary of the Treasury any national banking association may substitute the two per centum bonds issued under the provisions of this Act for any of the bonds deposited with the Treasurer to se-

cure circulation or to secure deposits of public money; and so much of an Act entitled "An Act to enable national banking associations to extend their corporate existence, and for other purposes," approved July twelfth, eighteen hundred and eighty-two, as prohibits any national bank which makes any deposit of lawful money in order to withdraw its circulating notes from receiving any increase of its circulation for the period of six months from the time it made such deposit of lawful money for the purpose aforesaid, is hereby repealed, and all other Acts or parts of Acts inconsistent with the provisions of this section are hereby repealed. (§ 12, Act of March 14, 1900.)

12. Preparation of Bank Circulation.

In order to furnish suitable notes for circulation, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved, in the best manner to guard against counterfeiting and fraudulent alterations, and shall have printed therefrom, and numbered, such quantity of circulating notes, in blank, of the denominations of five dollars, ten dollars, twenty dollars, fifty dollars, one hundred dollars, five hundred dollars, and one thousand dollars, as may be required to supply the associations entitled to receive the same, as amended by act of March 14, 1900. Such notes shall express upon their face that they are secured by United States bonds, deposited with the Treasurer of the United States, by the written or engraved signatures of the Treasurer and Register, and by the imprint of the seal of the Treasury; and shall also express upon their face the promise of the association receiving the same to pay on demand, attested by the signatures of the president or vice-president and cashier; and shall bear such devices and such other statements, and shall be in such form as the Secretary of the Treasury shall, by regulation, direct. (Rev. Stat. § 5172.)

13. Circulation Shall Bear Charter Number.

The Comptroller of the Currency shall, under such rules and

regulations as the Secretary of the Treasury may prescribe, cause the charter numbers of the associations to be printed upon all national-bank notes which may be hereafter issued by him. (§ 5 of act of June 20, 1874.)

14. Control of Plates and Dies.

The plates and special dies to be procured by the Comptroller of the Currency for the printing of such circulating notes shall remain under his control and direction and the expenses necessarily incurred in executing the laws respecting the procuring of such notes and all other expenses of the Bureau of the Currency [except as provided by § 3, act June 20, 1874, and §§ 6 and 8, act July 12, 1882] shall be paid out of the proceeds of the taxes or duties assessed and collected on the circulation of national banking associations under this Title. (Rev. Stat. § 5173.)

15. Examination of Plates and Dies.

The Comptroller of the Currency shall cause to be examined, each year, the plates, dies, but pieces [bed pieces], and other material from which the national-bank circulation is printed, in whole or in part, and file in his office annually a correct list of the same. Such material as shall have been used in the printing of the notes of associations which are in liquidation, or have closed business, shall be destroyed, under such regulations as shall be prescribed by the Comptroller of the Currency and approved by the Secretary of the Treasury. The expenses of any such examination or destruction shall be paid out of any appropriation made by Congress for the special examination of national banks and bank-note plates. (Rev. Stat. § 5174.)

16. Circulation, for what Receivable.

After any association receiving circulating notes under this Title has caused its promise to pay such notes on demand to be signed by the president or vice-president and cashier thereof, in such manner as to make them obligatory promissory notes,

payable on demand at its place of business, such association may issue and circulate the same as money. And the same shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the national currency. (Rev. Stat. § 5182.)

17. Circulation of Gold Banks.

Associations may be organized in the manner prescribed by this Title for the purpose of issuing notes payable in gold; and upon the deposit of any United States bonds bearing interest payable in gold with the Treasurer of the United States, in the manner prescribed for other associations, it shall be lawful for the Comptroller of the Currency to issue to the association making the deposit circulating notes of different denominations, but none of them of less than five dollars, and not exceeding in amount eighty per centum of the par value of the bonds deposited, which shall express the promise of the association to pay them, upon presentation at the office at which they are issued, in gold coin of the United States, and shall be so redeemable. (Rev. Stat. § 5185.)

18. Worn-out or Mutilated Circulation.

It shall be the duty of the Comptroller of the Currency to receive worn-out or mutilated circulating notes issued by any banking association, and also, on due proof of the destruction of any such circulating notes, to deliver in place thereof to the association other blank circulating notes to an equal amount. Such worn-out or mutilated notes, after a memorandum has been entered in the proper books, in accordance with such regulations as may be established by the Comptroller, as well as all circulating notes which shall have been paid or surrendered to be canceled, shall be macerated in presence of four persons, one to be appointed by the Secretary of the Treasury, one by

the Comptroller of the Currency, one by the Treasurer of the United States, and one by the association, under such regulations as the Secretary of the Treasury may prescribe. A certificate of such maceration, signed by the parties so appointed, shall be made in the books of the Comptroller, and a duplicate thereof forwarded to the association whose notes are thus canceled. (Rev. Stat. § 5184.)

19. Provisions for Redeeming Circulation.

Every association organized, or to be organized, under the provisions of the said act, and of the several acts amendatory thereof, shall at all times keep and have on deposit in the Treasury of the United States, in lawful money of the United States, a sum equal to five per centum of its circulation, to be held and used for the redemption of such circulation; which sum shall be counted as a part of its lawful reserve, as provided in section two of this act; and when the circulating notes of any such associations, assorted or unassorted, shall be presented for redemption, in sums of one thousand dollars or any multiple thereof, to the Treasurer of the United States, the same shall be redeemed in United States notes. All notes so redeemed shall be charged by the Treasurer of the United States to the respective associations issuing the same, and he shall notify them severally, on the first day of each month, or oftener, at his discretion, of the amount of such redemptions; and whenever such redemptions for any association shall amount to the sum of five hundred dollars, such association so notified shall forthwith deposit with the Treasurer of the United States a sum in United States notes equal to the amount of its circulating notes so redeemed. And all notes of national banks, worn, defaced, mutilated, or otherwise unfit for circulation, shall, when received by any assistant treasurer, or at any designated depository of the United States, be forwarded to the Treasurer of the United States for redemption as provided herein. And when such redemptions have been so reimbursed, the circulating notes so redeemed shall be forwarded to the respective associations by which they were issued; but if any

of such notes are worn, mutilated, defaced, or rendered otherwise unfit for use, they shall be forwarded to the Comptroller of the Currency and destroyed, and replaced as now provided by law: *Provided*, That each of said associations shall reimburse to the Treasury the charges for transportation and the costs for assorting such notes; and the associations hereafter organized shall also severally reimburse to the Treasury the cost of engraving such plates as shall be ordered by each association respectively; and the amount assessed upon each association shall be in proportion to the circulation redeemed, and be charged to the fund on deposit with the Treasurer. (§ 3, act of June 20, 1874.)

20. **Withdrawing Circulation.**

Any association organized under this act, or any of the acts of which this is an amendment, desiring to withdraw its circulating notes, in whole or in part, may, upon the deposit of lawful money with the Treasurer of the United States in sums of not less than nine thousand dollars, take up the bonds which said association has on deposit with the Treasurer for the security of such circulating notes, which bonds shall be assigned to the bank in the manner specified in the nineteenth section of the national-bank act; and the outstanding notes of said association, to an amount equal to the legal-tender notes deposited, shall be redeemed at the Treasury of the United States, and destroyed as now provided by law: *Provided*, That the amount of the bonds on deposit for circulation shall not be reduced below fifty thousand dollars. (§ 4, act June 20, 1874.)

21. **General Provisions for Withdrawing Circulation.**

The national banks which shall hereafter make deposits of lawful money for the retirement in full of their circulation shall, at the time of their deposit, be assessed for the cost of transporting and redeeming their notes then outstanding, a sum equal to the average cost of the redemption of national-bank notes during the preceding year, and shall thereupon pay such assessment; and all national banks which have heretofore

made or shall hereafter make deposits of lawful money for the reduction of their circulation shall be assessed, and shall pay an assessment in the manner specified in section three of the act approved June twentieth, eighteen hundred and seventy-four, for the cost of transporting and redeeming their notes redeemed from such deposits subsequently to June thirtieth, eighteen hundred and eighty-one. (§ 8, act of July 12, 1882.)

Any national banking association now organized, or hereafter organized, desiring to withdraw its circulating notes, upon a deposit of lawful money with the Treasurer of the United States, as provided in section four of the act of June twentieth, eighteen hundred and seventy-four, or as provided in this act, is authorized to deposit lawful money and withdraw a proportionate amount of the bonds held as security for its circulating notes in the order of such deposits: *Provided*, That not more than three millions of dollars of lawful money shall be deposited during any calendar month for this purpose: *And provided further*, That the provisions of this section shall not apply to bonds called for redemption by the Secretary of the Treasury, nor to the withdrawal of circulating notes in consequence thereof. (§ 9, as amended by act of March 14, 1900.)

22. Circulation of Extended Banks.

The circulating notes of any association so extending the period of its succession which shall have been issued to it prior to such extension shall be redeemed at the Treasury of the United States, as provided in section three of the act of June twentieth, eighteen hundred and seventy-four, entitled "An Act fixing the amount of United States notes, providing for redistribution of national bank currency, and for other purposes," and such notes when redeemed shall be forwarded to the Comptroller of the Currency, and destroyed, as now provided by law; and at the end of three years from the date of the extension of the corporate existence of each bank the association so extended shall deposit lawful money with the Treasury of the United States sufficient to redeem the remain-

der of the circulation which was outstanding at the date of its extension, as provided in sections fifty-two hundred and twenty-two, fifty-two hundred and twenty-four, and fifty-two hundred and twenty-five of the Revised Statutes; and any gain that may arise from the failure to present such circulating notes for redemption shall inure to the benefit of the United States; and from time to time, as such notes are redeemed or lawful money deposited therefor as provided herein, new circulating notes shall be issued as provided for by this act, bearing such devices, to be approved by the Secretary of the Treasury, as shall make them readily distinguishable from the circulating notes heretofore issued: *Provided, however,* That each banking association which shall obtain the benefit of this act shall reimburse to the Treasury the cost of preparing the plate or plates for such new circulating notes as shall be issued to it. (§ 6, act of July 12, 1882.)

23. Circulation of Liquidating Banks.

Whenever the Treasurer has redeemed any of the notes of an association which has commenced to close its affairs, he shall cause the notes to be mutilated and charged to the redemption account of the association; and all notes so redeemed by the Treasurer shall, every three months, be certified to and destroyed in the manner prescribed in section fifty-one hundred and eighty-four. (Rev. Stat. § 5225.)

24. Circulation of Closed Banks.

And it shall be the duty of the Treasurer, assistant treasurers, designated depositaries, and national bank depositaries of the United States to assort and return to the Treasury for redemption the notes of such national banks as have failed, or gone into voluntary liquidation for the purpose of winding up their affairs, and of such as shall hereafter so fail or go into liquidation. (§ 8, act of June 20, 1874.)

25. Regulations for Redemption Records.

The Secretary of the Treasury may, from time to time, make such regulations respecting the disposition to be made of cir-

culating notes after presentation at the Treasury of the United States for payment, and respecting the perpetuation of the evidence of the payment thereof, as may seem to him proper. (Rev. Stat. § 5232.)

26. Redeemed Notes to be Canceled.

All notes of national banking associations presented at the Treasury of the United States for payment shall, on being paid, be canceled. (Rev. Stat. § 5233.)

27. Redemption in United States Notes.

When the circulating notes of any such associations, assorted or unassorted, shall be presented for redemption, in sums of one thousand dollars or any multiple thereof, to the Treasurer of the United States, the same shall be redeemed in United States notes. (§ 3, act of June 20, 1874.)

28. Disposition of Redemption Account.

Upon the passage of this act the balances standing with the Treasurer of the United States to the respective credits of national banks for deposits made to redeem the circulating notes of such banks, and all deposits thereafter received for like purpose, shall be covered into the Treasury as a miscellaneous receipt, and the Treasury of the United States shall redeem from the general cash in the Treasury the circulating notes of said banks which may come into his possession subject to redemption; and upon the certificate of the Comptroller of the Currency that such notes have been received by him and that they have been destroyed and that no new notes will be issued in their place, reimbursement of their amount shall be made to the Treasurer, under such regulations as the Secretary of the Treasury may prescribe, from an appropriation hereby created, to be known as "national-bank notes, redemption account." But the provisions of this act shall not apply to the deposits received under section three of the act of June twentieth, eighteen hundred and seventy-four, requiring every national bank to keep in lawful money with the Treasurer of

the United States a sum equal to five per centum of its circulation, to be held and used for the redemption of its circulating notes; and the balance remaining of the deposits so covered shall, at the close of each month, be reported on the monthly public debt statement as debt of the United States bearing no interest. (§ 6, act of July 14, 1890.)

29. Redemption of Incomplete Circulation.

The provisions of the Revised Statutes of the United States, providing for the redemption of national-bank notes, shall apply to all national-bank notes that have been or may be issued to, or received by, any national bank, notwithstanding such notes may have been lost by or stolen from the bank and put in circulation without the signature or upon the forged signature of the president or vice-president and cashier. (Act of July 28, 1892.)

30. Banks Take Circulation at Par.

Every national banking association formed or existing under this Title shall take and receive at par, for any debt or liability to it, any and all notes or bills issued by any lawfully organized national banking association. But this provision shall not apply to any association organized for the purpose of issuing notes payable in gold. (Rev. Stat. § 5196.)

31. Issue of Other Notes Prohibited.

No national banking association shall issue post notes or any other notes to circulate as money than such as are authorized by the provisions of this Title. (Rev. Stat. § 5183.)

32. Fraudulent Notes to be Marked.

All United States officers charged with the receipt or disbursement of public moneys, and all officers of national banks, shall stamp or write in plain letters the word "counterfeit," "altered," or "worthless," upon all fraudulent notes issued in the form of and intended to circulate as money which shall be presented at their places of business; and if such officer

shall wrongfully stamp any genuine note of the United States, or of the national banks, they shall, upon presentation, redeem such notes at the face value thereof. (§ 5, act of June 30, 1876.)

DIVISION III.

TAX ON CIRCULATION.

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. Tax on circulation. 2. Semi-annual return of circulation. 3. Proceedings on default. 4. Enforcing tax on circulation. 5. Refunding excess tax. 6. Circulation, when exempt from tax. 7. Tax on unauthorized circulation. | <ol style="list-style-type: none"> 8. Semi-annual return of taxable circulation. 9. Failure to make such return. 10. Tax on converted bank circulation. 11. Tax provisions restricted. 12. Taxation of notes, etc. |
|---|---|

1. Tax on Circulation.

In lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, a duty of one-half of one per centum each half year upon the average amount of its notes in circulation. (Rev. Stat. § 5214.)

Section 13 of the act of Congress approved March 14, 1900, provides that every national banking association having on deposit, as provided by law, bonds of the United States bearing interest at the rate of two per centum per annum, issued under the provisions of this act, to secure its circulating notes, shall pay to the Treasurer of the United States, in the months of January and July, a tax of one-fourth of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of said two per centum bonds; and such taxes shall be in lieu of existing taxes on its notes in circulation imposed by section fifty-two hundred and fourteen of the Revised Statutes. (Rev. Stat. § 5214.)

2. Semi-annual Return of Circulation.

In order to enable the Treasurer to assess the duties im-

posed by the preceding sections, each association shall, within ten days from the first days of January and July of each year, make a return, under the oath of its president or cashier, to the Treasurer of the United States, in such form as the Treasurer may prescribe, of the average amount of its notes in circulation for the six months next preceding the most recent first day of January or July. Every association which fails so to make such return shall be liable to a penalty of two hundred dollars, to be collected either out of the interest as it may become due such association on the bonds deposited with the Treasurer, or, at his option, in the manner in which penalties are to be collected of other corporations under the laws of the United States. (Rev. Stat. § 5215.)

3. Proceedings on Default.

Whenever any association fails to make the half yearly return required by the preceding section, the duties to be paid by such association shall be assessed upon the amount of notes delivered to such association by the Comptroller of the Currency. (Rev. Stat. § 5216.)

4. Enforcing Tax on Circulation.

Whenever an association fails to pay the duties imposed by the three preceding sections, the sums due may be collected in the manner provided for the collection of United States taxes from other corporations; or the Treasurer may reserve the amount out of the interest, as it may become due, on the bonds deposited with him by such defaulting association. (Rev. Stat. § 5217.)

5. Refunding Excess Tax.

In all cases where an association has paid or may pay in excess of what may be or has been found due from it, on account of the duty required to be paid to the Treasurer of the United States, the association may state an account therefor, which, on being certified by the Treasurer of the United States, and found correct by the Comptroller of the Treasury, shall

be refunded in the ordinary manner by warrant on the Treasury. (Rev. Stat. § 5218.)

6. Circulation, When Exempt from Tax.

Whenever the outstanding circulation of any bank, association, corporation, company, or person is reduced to an amount not exceeding five per centum of the chartered or declared capital existing at the time the same was issued, said circulation shall be free from taxation; and whenever any bank which has ceased to issue notes for circulation deposits in the Treasury of the United States, in lawful money, the amount of its outstanding circulation to be redeemed at par under such regulations as the Secretary of the Treasury shall prescribe, it shall be exempt from any tax upon such circulation. (Rev. Stat. § 3411.)

7. Tax on Unauthorized Circulation.

The act of February 8, 1875, provides: That every person, firm, association, other than national bank associations, and every corporation, state bank, or state banking association shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by them. (§ 19.)

That every such person, firm, association, corporation, state bank or state banking association, and also every national banking association, shall pay a like tax of ten per centum on the amount of notes of any person, firm, association, other than a national banking association, or of any corporation, state bank, or state banking association, or of any town, city, or municipal corporation, used for circulation and paid out by them. (§ 20.)

That the amount of such circulating notes, and of the tax due thereon, shall be returned, and the tax paid at the same time, and in the same manner, and with like penalties for failure to return and pay the same, as provided by law for the return and payment of taxes on deposits, capital, and circulation imposed by the existing provisions of internal-revenue law. (§ 21.)

8. Semi-annual Return of Taxable Circulation.

A true and complete return of the monthly amount of circulation, as aforesaid, and of the monthly amount of notes of persons, town, city, or municipal corporation, state banks, or state banking associations paid out as aforesaid for the previous six months, shall be made and rendered in duplicate on the first day of December and the first day of June by each of such banks, associations, corporations, companies, or persons, with a declaration annexed thereto, under the oath of such person, or of the president or cashier of such bank, association, corporation, or company, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful statement of the amounts subject to tax, as aforesaid; and one copy shall be transmitted to the collector of the district in which any such bank, association, corporation, or company is situated, or in which such person has his place of business, and one copy to the Commissioner of Internal Revenue. (Rev. Stat. § 3414.)

9. Failure to Make Such Return.

In default of the returns provided in the preceding section the amount of circulation, and notes of persons, town, city, and municipal corporations, state banks, and state banking associations paid out, as aforesaid, shall be estimated by the Commissioner of Internal Revenue, upon the best information he can obtain. And for any refusal or neglect to make return and payment any such bank, association, corporation, company, or person so in default shall pay a penalty of two hundred dollars, besides the additional penalty and forfeitures provided in other cases. (Rev. Stat. § 3415.)

10. Tax on Converted Bank Circulation.

Whenever any state bank or banking association has been converted into a national banking association, and such national banking association has assumed the liabilities of such state bank or banking association, including the redemption of its bills, by any agreement or understanding whatever with

the representatives of such state bank or banking association, such national banking association shall be held to make the required return and payment on the circulation outstanding, so long as such circulation shall exceed five per centum of the capital before such conversion of such state bank or banking association. (Rev. Stat. § 3416.)

11. Tax Provisions Restricted.

The provisions of this chapter relating to the tax on the circulation of banks and to their returns, except as contained in sections thirty-four hundred and eleven, thirty-four hundred and twelve, thirty-four hundred and thirteen, and thirty-four hundred and sixteen, and such parts of sections thirty-four hundred and fourteen and thirty-four hundred and fifteen as relate to the tax of ten per centum on certain notes, shall not apply to associations which are taxed under and by virtue of Title "National Banks." (Rev. Stat. § 3417.)

12. Taxation of Notes, etc.

All stocks, bonds, Treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal or local authority. (Rev. Stat. § 3701.)

The act of August 13, 1894, provides: That circulating notes of national banking associations and United States legal-tender notes and other notes and certificates of the United States, payable on demand and circulating or intended to circulate as currency, and gold, silver, or other coin shall be subject to taxation as money on hand or on deposit under the laws of any state or territory: *Provided*, That any such taxation shall be exercised in the same manner and at the same rate that any such state or territory shall tax money or currency circulating as money within its jurisdiction. (§ 1.)

That the provisions of this act shall not be deemed or held to change existing laws in respect of the taxation of national banking associations. (§ 2.)

DIVISION IV.

REGULATION OF THE BANKING BUSINESS.

- | | |
|--|--|
| <ol style="list-style-type: none"> 1. Laws governing certain associations. 2. Place of business. 3. Reserve cities and reserve requirements. 4. Reserve not maintained. 5. Reserve agents' balances counted as reserve. 6. Clearing house certificates counted as reserve. 7. United States note certificates counted as reserve. 8. Redemption of such certificates. 9. United States gold certificates counted as reserve. 10. Reserve requirements for gold banks. 11. Reserve deposit in central reserve city. 12. Additional reserve cities. 13. Additional central reserve cities. 14. Interest. 15. Penalty for unlawful interest. 16. Surplus and dividends. 17. Restriction on loans. 18. Associations must not hold their own stock. | <ol style="list-style-type: none"> 19. Restriction on bank's liability. 20. Improper use of bank circulation. 21. Unearned dividends prohibited. 22. Assessment for impairment of capital. 23. Provision for enforcement of assessment. 24. Prohibition against uncurrent notes. 25. List of shareholders. 26. Reports of condition. 27. Verification of such reports. 28. Reports of dividends and earnings. 29. Penalty for failure to report. 30. Reports of other banks. 31. State taxation of national banks. 32. National bank examiners. 33. Compensation of examiners. 34. Examinations in District of Columbia. 35. Limitation of visitorial powers. 36. Use of "National" in titles. |
|--|--|

1. Laws Governing Certain Associations.

The provisions of chapters two, three, and four [three, five, and seven of this edition] of this Title, which are expressed without restrictive words, as applying to "national banking association," or to "associations," apply to all associations organized to carry on the business of banking under any act of Congress. (Rev. Stat. § 5157.)

2. Place of Business.

The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate. (Rev. Stat. § 5190.)

3. Reserve Cities and Reserve Requirements.

Every national banking association in either of the following cities: Albany, Baltimore, Boston, Cincinnati, Chicago, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Saint Louis, San Francisco, and Washington, shall at all times have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of the aggregate amount of its deposits in all respects; and every other association shall at all times have on hand, in lawful money of the United States, an amount equal to at least fifteen per centum of the aggregate amount of its deposits in all respects. (Rev. Stat. § 5191.)

4. Reserve Not Maintained.

Whenever the lawful money of any association in any of the cities named shall be below the amount of twenty-five per centum of its deposits, and whenever the lawful money of any other association shall be below fifteen per centum of its deposits, such association shall not increase its liabilities by making any new loans or discounts otherwise than by discounting or purchasing bills of exchange payable at sight, nor make any dividend of its profits until the required proportion between the aggregate amount of its deposits and its lawful money of the United States has been restored. And the Comptroller of the Currency may notify any association, whose lawful-money reserve shall be below the amount above required to be kept on hand, to make good such reserve; and if such association shall fail for thirty days thereafter so to make good its reserve of lawful money, the Comptroller may, with the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the business of the association, as provided in section fifty-two hundred and thirty-four. (Rev. Stat. § 5191.)

5. Reserve Agents' Balances Counted as Reserve.

Three-fifths of the reserve of fifteen per centum required by the preceding section to be kept may consist of balances due to an association from associations approved by the Comp-

troller of the Currency, organized under the act of June three, eighteen hundred and sixty-four, or under this Title, and doing business in the cities of Albany, Baltimore, Boston, Charleston, Chicago, Cincinnati, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Richmond, Saint Louis, San Francisco, and Washington. (Rev. Stat. § 5192.)

6. Clearing House Certificates Counted as Reserve.

Clearing-house certificates, representing specie or lawful money specially deposited for the purpose, of any clearing-house association shall also be deemed to be lawful money in the possession of any association belonging to such clearing house, holding and owning such certificate, within the preceding section. (Rev. Stat. § 5192.)

7. United States Note Certificates Counted as Reserve.

The Secretary of the Treasury may receive United States notes on deposit, without interest, from any national banking associations, in sums of not less than ten thousand dollars, and issue certificates therefor in such form as he may prescribe, in denominations of not less than five thousand dollars, and payable on demand in United States notes at the place where the deposits were made. The notes so deposited shall not be counted as part of the lawful-money reserve of the association; but the certificates issued therefor may be counted as part of its lawful-money reserve, and may be accepted in the settlement of clearing-house balances at the places where the deposits therefor were made. (Rev. Stat. § 5193, repealed March 14, 1900.)

8. Redemption of Such Certificates.

The power conferred on the Secretary of the Treasury, by the preceding section shall not be exercised so as to create any expansion or contraction of the currency; and United States notes for which certificates are issued under that section, or other United States notes of like amount, shall be held as

special deposits in the Treasury and used only for redemption of such certificates. (Rev. Stat. § 5194.)

9. United States Gold Certificates Counted as Reserve.

The Secretary of the Treasury is authorized and directed to receive deposits of gold coin with the Treasurer or assistant treasurers of the United States, in sums not less than twenty dollars, and to issue certificates therefor in denominations of not less than twenty dollars each, corresponding with the denominations of United States notes. The coin deposited for or representing the certificates of deposit shall be retained in the Treasury for the payment of the same on demand. Said certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued; and such certificates, as also silver certificates, when held by any national banking association, shall be counted as part of its lawful reserve; and no national banking association shall be a member of any clearing house in which such certificates shall not be receivable in the settlement of clearing-house balances: *Provided*, That the Secretary of the Treasury shall suspend the issue of such gold certificates whenever the amount of gold coin and gold bullion in the Treasury reserved for the redemption of United States notes falls below one hundred millions of dollars; and the provisions of section fifty-two hundred and seven of the Revised Statutes shall be applicable to the certificates herein authorized and directed to be issued. (§ 12 of the act of July 12, 1882.)

10. Reserve Requirements for Gold Banks.

Every association organized for the purpose of issuing notes payable in gold shall at all times keep on hand not less than twenty-five per centum of its outstanding circulation, in gold or silver coin of the United States; and shall receive at par in the payment of debts the gold notes of every other such association which at the time of such payment is redeeming its circulating notes in gold coin of the United States, and shall be subject to all the provisions of this Title: *Provided*, That, in

applying the same to associations organized for issuing gold notes, the terms "lawful money" and "lawful money of the United States" shall be construed to mean gold or silver coin of the United States; and the circulation of such association shall not be within the limitation of circulation mentioned in this Title. (Rev. Stat. § 5186.)

11. Reserve Deposit in Central Reserve City.

Each association organized in any of the cities named in section fifty-one hundred and ninety-one may keep one-half of its lawful-money reserve in cash deposits in the city of New York. But the foregoing provision shall not apply to associations organized and located in the city of San Francisco for the purpose of issuing notes payable in gold. This section shall not relieve any association from its liability to redeem its circulating notes at its own counter at par in lawful money on demand. (Rev. Stat. § 5195.)

12. Additional Reserve Cities.

Whenever three-fourths in number of the national banks located in any city of the United States having a population of twenty-five thousand people shall make application to the Comptroller of the Currency, in writing, asking that the name of the city in which such banks are located shall be added to the cities named in sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-two of the Revised Statutes, the Comptroller shall have authority to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of its deposits, as provided in sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-five of the Revised Statutes. (§ 1, act of March 3, 1887, as amended by act of March 3, 1903.)

13. Additional Central Reserve Cities.

Whenever three-fourths in number of the national banks located in any city of the United States having a population of

two hundred thousand people shall make application to the Comptroller of the Currency, in writing, asking that such city may be a central reserve city, like the city of New York, in which one-half of the lawful-money reserve of the national banks located in other reserve cities may be deposited, as provided in section fifty-one hundred and ninety-five of the Revised Statutes, the Comptroller shall have authority, with the approval of the Secretary of the Treasury, to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, twenty-five per centum of its deposits, as provided in section fifty-one hundred and ninety-one of the Revised Statutes. (§ 2 of act of March 3, 1887.)

14. Interest.

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state, territory, or district where the bank is located, and no more, except that where by the laws of any state, a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this Title. When no rate is fixed by the laws of the state, or territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days from which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. (Rev. Stat. § 5197.)

15. Penalty for Unlawful Interest.

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when

knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred. (Rev. Stat. § 5198.)

16. Surplus and Dividends.

The directors of any association may semiannually declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half year to its surplus fund until the same shall amount to twenty per centum of its capital stock. (Rev. Stat. § 5199.)

17. Restriction of Loans.

The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same shall not be considered as money borrowed. (Rev. Stat. § 5200.)

18. Associations Must Not Hold Their Own Stock.

No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt pre-

viously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section fifty-two hundred and thirty-four. (Rev. Stat. § 5201.)

19. Restriction on Bank's Liability.

No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits. (Rev. Stat. § 5202.)

20. Improper Use of Bank Circulation.

No association shall, either directly or indirectly, pledge or hypothecate any of its notes of circulation for the purpose of procuring money to be paid in on its capital stock, or to be used in its banking operations, or otherwise; nor shall any association use its circulating notes, or any part thereof, in any manner or form to create or increase its capital stock. (Rev. Stat. § 5203.)

21. Unearned Dividends Prohibited.

No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association equal to or exceeding its undivided profits then on hand,

no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any associations, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three. (Rev. Stat. § 5204.)

22. Assessment for Impairment of Capital.

Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four. (Rev. Stat. § 5205.)

23. Provision for Enforcement of Assessment.

If any shareholder or shareholders of a bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice

of sale in the office of the bank and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto) to make good the deficiency and the balance, if any, shall be returned to such delinquent shareholder or shareholders. (§ 4, act of June 30, 1876.)

24. Prohibition Against Uncurrent Notes.

No association shall at any time pay out on loans or discounts, or in purchasing drafts or bills of exchange, or in payment of deposits, or in any other mode pay or put in circulation the notes of any bank or banking association which are not, at any such time, receivable, at par, on deposit, and in payment of debts by the association so paying out or circulating such notes; nor shall any association knowingly pay out or put in circulation any notes issued by any bank or banking association which at the time of such paying out or putting in circulation is not redeeming its circulating notes in lawful money of the United States. (Rev. Stat. § 5206.)

25. List of Shareholders.

The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency. (Rev. Stat. § 5210.)

26. Reports of Condition.

Every association shall make to the Comptroller of the Currency not less than five reports during each year, according

to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the associations at the close of business on any past day by him specified, and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition. (Rev. Stat. § 5211.)

27. Verification of Such Reports.

The oath or affirmation required by section fifty-two hundred and eleven of the Revised Statutes, verifying the returns made by national banks to the Comptroller of the Currency, when taken before a notary public properly authorized and commissioned by the state in which such notary resides and the bank is located, or any other officer having an official seal, authorized in such state to administer oaths, shall be a sufficient verification as contemplated by said section fifty-two hundred and eleven: *Provided*, That the officer administering the oath is not an officer of the bank. (Act of Feb. 26, 1881.)

28. Reports of Dividends and Earnings.

In addition to the reports required by the preceding section, each association shall report to the Comptroller of the Currency, within ten days after declaring any dividend, the amount of such dividend and the amount of net earnings in excess of such dividend. Such reports shall be attested by the oath of

the president or cashier of the association. (Rev. Stat. § 5212.)

29. Penalty for Failure to Report.

Every association which fails to make and transmit any report required under either of the two preceding sections shall be subject to a penalty of one hundred dollars for each day after the periods, respectively, therein mentioned, that it delays to make and transmit its report. Whenever any association delays or refuses to pay the penalty herein imposed, after it has been assessed by the Comptroller of the Currency, the amount thereof may be retained by the Treasurer of the United States, upon the order of the Comptroller of the Currency, out of the interest, as it may become due to the association, on the bonds deposited with him to secure circulation. All sums of money collected for penalties under this section shall be paid into the Treasury of the United States. (Rev. Stat. § 5213.)

30. Reports of Other Banks.

All banks or savings companies or institutions organized under authority of any act of Congress to do business in the District of Columbia shall be, and are hereby, required to make to the Comptroller of the Currency, and publish, all the reports which national banking associations are required to make and publish, under the provisions of sections fifty-two hundred and eleven, fifty-two hundred and twelve, and fifty-two hundred and thirteen of the Revised Statutes, and shall be subject to the same penalties for failure to make or publish such reports as are therein provided, which penalties may be collected by suit before the supreme court of the District of Columbia. (§ 6 of act of June 30, 1876, as amended by acts of March 3, 1901, and June 30, 1902.)

31. State Taxation of National Banks.

Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes im-

posed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state county, or municipal taxes, to the same extent, according to its value, as other real property is taxed. (Rev. Stat. § 5219.)

32. National-Bank Examiners.

The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall, as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and in doing so to examine any of the officers and agents thereof on oath; and shall make a full and detailed report of the condition of the association to the Comptroller. But no person shall be appointed to examine the affairs of any banking association of which he is a director or other officer. (Rev. Stat. § 5240.)

33. Compensation of Examiners.

All persons appointed to be examiners of national banks not located in the redemption cities specified in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the states of Oregon, California, and Nevada, or in the territories, shall receive compensation for such examination as follows: For examining national banks having a capital less than one hundred thousand dollars, twenty dollars; those having a capital of one hundred thousand dollars and less than three hundred thousand dollars,

twenty-five dollars; those having a capital of three hundred thousand dollars and less than four hundred thousand dollars, thirty-five dollars; those having a capital of four hundred thousand dollars and less than five hundred thousand dollars, forty dollars; those having a capital of five hundred thousand dollars and less than six hundred thousand dollars, fifty dollars; those having a capital of six hundred thousand dollars and over, seventy-five dollars; which amounts shall be assessed by the Comptroller of the Currency upon, and paid by, the respective association so examined, and shall be in lieu of the compensation and mileage heretofore allowed for making said examinations; and persons appointed to make examinations of national banks in the cities named in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the states of Oregon, California, and Nevada, or in the territories, shall receive such compensation as may be fixed by the Secretary of the Treasury upon the recommendation of the Comptroller of the Currency; and the same shall be assessed and paid in the manner hereinbefore provided. (Rev. Stat. § 5240.)

34. Examinations in District of Columbia.

The Comptroller of the Currency, in addition to the powers conferred upon him by law for the examination of national banks, is further authorized, whenever he may deem it useful, to cause examination to be made into the condition of any bank in the District of Columbia organized under act of Congress. The Comptroller, at his discretion, may report to Congress the results of such examination. The expense necessarily incurred in any such examination shall be paid out of any appropriation made by Congress for special bank examinations. (Rev. Stat. § 332.)

35. Limitation of Visitorial Powers.

No association shall be subject to any visitorial powers other than such as are authorized by this Title, or are vested in the courts of justice. (Rev. Stat. § 5241.)

36. Use of "National" in Titles.

All banks not organized and transacting business under the national currency laws, or under this Title, and all persons or corporations doing the business of bankers, brokers, or savings institutions, except savings banks authorized by Congress to use the word "national" as a part of their corporate name, are prohibited from using the word "national" as a portion of the name or title of such bank, corporation, firm, or partnership; and any violation of this prohibition committed after the third day of September, eighteen hundred and seventy-three, shall subject the party chargeable therewith to a penalty of fifty dollars for each day during which it is permitted or repeated. (Rev. Stat. § 5243.)

DIVISION V.

EXTENSION OF CORPORATE EXISTENCE.

- | | |
|--|---|
| 1. Corporate existence may be extended.
2. Consent of two-thirds necessary.
3. Special examination of bank.
4. Status not changed by extension. | 5. Dissenting shareholders may withdraw.
6. Re-extension of corporate existence. |
|--|---|

1. Corporate Existence May be Extended.

The act of July 12, 1882, provides: That any national banking association organized under the acts of February twenty-fifth, eighteen hundred and sixty-three, June third, eighteen hundred and sixty-four, and February fourteenth, eighteen hundred and eighty, or under sections fifty-one hundred and thirty-three, fifty-one hundred and thirty-four, fifty-one hundred and thirty-five, fifty-one hundred and thirty-six, and fifty-one hundred and fifty-four of the Revised Statutes of the United States, may, at any time within the two years next previous to the date of the expiration of its corporate existence under present law, and with the approval of the Comptroller of the Currency, to be granted as hereinafter provided, extend its period of succession by amending its articles of association

for a term of not more than twenty years from the expiration of the period of succession named in said articles of association, and shall have succession for such extended period, unless sooner dissolved by the act of shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law, or unless hereafter modified or repealed. (§ 1.)

2. Consent of Two-thirds Necessary.

That such amendment of said articles of association shall be authorized by the consent in writing of shareholders owning not less than two-thirds of the capital stock of the association; and the board of directors shall cause such consent to be certified under the seal of the association, by its president or cashier, to the Comptroller of the Currency, accompanied by an application made by the president or cashier for the approval of the amended articles of association by the Comptroller; and such amended articles of association shall not be valid until the Comptroller shall give to such association a certificate under his hand and seal that the association has complied with all the provisions required to be complied with and is authorized to have succession for the extended period named in the amended articles of association. (§ 2.)

3. Special Examination of Bank.

That upon the receipt of the application and certificate of the association provided for in the preceding section, the Comptroller of the Currency shall cause a special examination to be made, at the expense of the association, to determine its condition; and if after such examination or otherwise it appears to him that said association is in a satisfactory condition, he shall grant his certificate of approval provided for in the preceding section, or if it appears that the condition of said association is not satisfactory, he shall withhold such certificate of approval. (§ 3.)

4. Status Not Changed by Extension.

That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted and shall continue to be subject to all the duties, liabilities, and restrictions imposed by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it*was before the extension of its period of succession. (§ 4.)

5. Dissenting Shareholders May Withdraw.

That when any national banking association has amended its articles of association as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder, from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section: *Provided*, That in the organization of any banking association intended to replace any existing banking association, and retaining the name thereof, the holders of stock in the expiring association shall be entitled to preference in the allotment of the shares of the

new association in proportion to the number of shares held by them respectively in the expiring association. (§ 5.)

6. Re-extension of Corporate Existence.

The act of Congress, approved April 12, 1902, provides that the Comptroller of the Currency is hereby authorized in the manner provided by, and under the conditions and limitations of the act of July 12, 1882, to extend for a further period of twenty years the charter of any national banking association extended under said act which shall desire to continue its existence after the expiration of its charter.

DIVISION VI.

LIQUIDATION AND RECEIVERSHIP.

- | | |
|---|---|
| 1. Two-thirds vote required for liquidation. | 15. Appointment and duties of receiver. |
| 2. Notice of voluntary liquidation. | 16. When receiver may be appointed. |
| 3. Deposit of lawful money. | 17. Notice to creditors of insolvent banks. |
| 4. No deposit required for consolidation. | 18. Distribution of assets of insolvent banks. |
| 5. Bonds of liquidating banks. | 19. Expenses of receivership—how paid. |
| 6. Banks whose existence has expired. | 20. Forfeiture of charter and liability of directors. |
| 7. Protest of bank circulation. | 21. Receiver may purchase property to protect his trust. |
| 8. Bonds forfeited if circulation is dishonored. | 22. Taxes on insolvent national banks remitted. |
| 9. Bank may enjoin further proceedings. | 23. Appointment and qualification of shareholders' agent. |
| 10. Where proceedings must be brought. | 24. Duties of shareholders' agent. |
| 11. Suspension of business after default. | 25. Illegal preference of creditors. |
| 12. Notice to present circulation for redemption. | 26. Creditor's bill against shareholders. |
| 13. Bonds sold at public auction. | 27. Expenses of failed banks. |
| 14. Bonds sold at private sale. | |

1. Two-thirds Vote Required for Liquidation.

Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock. (Rev. Stat. § 5220.)

2. Notice of Voluntary Liquidation.

Whenever a vote is taken to go into liquidation it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association, by its president or cashier, to the Comptroller of the Currency, and the publication thereof to be made for a period of two months in a newspaper published in the city of New York, and also in a newspaper published in the city or town in which the association is located, or if no newspaper is there published, then in the newspaper published nearest thereto, that the association is closing up its affairs, and notifying the holders of its notes and other creditors to present the notes and other claims against the association for payment. (Rev. Stat. § 5221.)

3. Deposit of Lawful Money.

Within six months from the date of the vote to go into liquidation the association shall deposit with the Treasurer of the United States lawful money of the United States sufficient to redeem all its outstanding circulation. The Treasurer shall execute duplicate receipts for money thus deposited, and deliver one to the association and the other to the Comptroller of the Currency, stating the amount received by him, and the purpose for which it has been received; and the money shall be paid into the Treasury of the United States, and placed to the credit of such association upon redemption account. (Rev. Stat. § 5222.)

4. No Deposit Required for Consolidation.

An association which is in good faith winding up its business for the purpose of consolidating with another association shall not be required to deposit lawful money for its outstanding circulation; but its assets and liabilities shall be reported by the association with which it is in process of consolidation. (Rev. Stat. § 5223.)

5. Bonds of Liquidating Banks.

Whenever a sufficient deposit of lawful money to redeem the outstanding circulation of an association proposing to close its

business has been made, the bonds deposited by the association to secure payment of its notes shall be reassigned to it, in the manner prescribed by section fifty-one hundred and sixty-two. And thereafter the association and its shareholders shall stand discharged from all liabilities upon the circulating notes, and those notes shall be redeemed at the Treasury of the United States. And if any such bank shall fail to make the deposit and take up its bonds for thirty days after the expiration of the time specified, the Comptroller of the Currency shall have power to sell the bonds pledged for the circulation of said bank at public auction in New York City, and, after providing for the redemption and cancellation of said circulation, and the necessary expenses of the sale, to pay over any balance remaining to the bank or its legal representative. (Rev. Stat. § 5224.)

6. Banks Whose Existence Has Expired.

National banking associations whose corporate existence has expired or shall hereafter expire, and which do not avail themselves of the provisions of this act, shall be required to comply with the provisions of sections fifty-two hundred and twenty-one and fifty-two hundred and twenty-two of the Revised Statutes in the same manner as if the shareholders had voted to go into liquidation, as provided in section fifty-two hundred and twenty of the Revised Statutes; and the provisions of sections fifty-two hundred and twenty-four and fifty-two hundred and twenty-five of the Revised Statutes shall also be applicable to such associations, except as modified by this act; and the franchise of such associations is hereby extended for the sole purpose of liquidating their affairs until such affairs are finally closed. (§ 7, act of July 12, 1882.)

7. Protest of Bank Circulation.

Whenever any national banking association fails to redeem in the lawful money of the United States any of its circulating notes, upon demand of payment duly made during the usual hours of business, at the office of such association, the holder

may cause the same to be protested, in one package by a notary public, unless the president or cashier of the association whose notes are presented for payment offers to waive demand and notice of the protest, and, in pursuance of such offer, makes, signs, and delivers to the party making such demand an admission in writing, stating the time of the demand, the amount demanded, and the fact of the nonpayment thereof. The notary public, on making such protest, or upon receiving such admission, shall forthwith forward such admission or notice of protest to the Comptroller of the Currency, retaining a copy thereof. If, however, satisfactory proof is produced to the notary public that the payment of the notes demanded is restrained by order of any court of competent jurisdiction, he shall not protest the same. When the holder of any notes causes more than one note or package to be protested on the same day, he shall not receive pay for more than one protest. (Rev. Stat. § 5226.)

8. Bonds Forfeited If Circulation is Dishonored.

On receiving notice that any national banking association has failed to redeem any of its circulating notes, as specified in the preceding section, the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent, of whose appointment immediate notice shall be given to such association, who shall immediately proceed to ascertain whether it has refused to pay its circulating notes in the lawful money of the United States, when demanded, and shall report to the Comptroller the fact so ascertained. If from such protest, and the report so made, the Comptroller is satisfied that such association has refused to pay its circulating notes and is in default, he shall, within thirty days after he has received notice of such failure, declare the bonds deposited by such association forfeited to the United States, and they shall thereupon be so forfeited. (Rev. Stat. § 5227.)

9. Bank May Enjoin Further Proceedings.

Whenever an association against which proceedings have

been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of the jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal. (Rev. Stat. § 5237.)

10. Where Proceedings Must be Brought.

All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located. (Rev. Stat. § 736.)

11. Suspension of Business After Default.

After a default on the part of an association to pay any of its circulating notes has been ascertained by the Comptroller, and notice thereof has been given by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits. (Rev. Stat. § 5228.)

12. Notice to Present Circulation for Redemption.

Immediately upon declaring the bonds of an association forfeited for nonpayment of its notes, the Comptroller shall give notice, in such manner as the Secretary of the Treasury shall,

by general rules or otherwise direct, to the holders of the circulating notes of such association, to present them for payment at the Treasury of the United States; and the same shall be paid as presented in lawful money of the United States; whereupon the Comptroller may, in his discretion, cancel an amount of bonds pledged by such association equal at current market rates, not exceeding par, to the notes paid. (Rev. Stat. § 5229.)

13. Bonds Sold at Public Auction.

Whenever the Comptroller has become satisfied, by the protest or the waiver and admission specified in section fifty-two hundred and twenty-six, or by the report provided for in section fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes, he may, instead of canceling its bonds, cause so much of them as may be necessary to redeem its outstanding notes to be sold at public auction in the city of New York, after giving thirty days' notice of such sale to the association. For any deficiency in the proceeds of all the bonds of an association, when thus sold, to reimburse to the United States the amount expended in paying the circulating notes of the association, the United States shall have a paramount lien upon all its assets; and such deficiency shall be made good out of such assets in preference to any and all other claims whatsoever, except the necessary costs and expenses of administering the same. (Rev. Stat. § 5230.)

14. Bonds Sold at Private Sale.

The Comptroller may, if he deems it for the interest of the United States, sell at private sale any of the bonds of an association shown to have made default in paying its notes, and receive therefor either money or the circulating notes of the association. But no such bonds shall be sold by private sale for less than par, nor for less than the market value thereof at the time of sale; and no sales of any such bonds, either public or private, shall be complete until the transfer of the bonds shall have been made with the formalities prescribed by sec-

tions fifty-one hundred and sixty-two, fifty-one hundred and sixty-three, and fifty-one hundred and sixty-four. (Rev. Stat. § 5231.)

15. Appointment and Duties of Receiver.

On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings. (Rev. Stat. § 5234.)

16. When Receiver May be Appointed.

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of the national banking association, he may, after due examination of

its affairs, in either case, appoint a receiver, who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes.

A receiver may also be appointed, under the provisions of section fifty-two hundred and thirty-four of the Revised Statutes of the United States, for the following violations of law:

Where the capital stock of a national bank has not been fully paid in and it is thus reduced below the legal minimum and remains so for thirty days.

For failure to make good the lawful-money reserve within thirty days after notice.

Where a bank purchases or acquires its own stock, other than to prevent loss upon a debt previously contracted in good faith, and the same is not sold or disposed of within six months from the time of its purchase.

For failure to make good any impairment in its capital stock and refusing to go into liquidation within three months after receiving notice.

For false certification of checks by any officer, clerk, or agent. (§ 1, act of June 30, 1876.)

17. Notice to Creditors of Insolvent Banks.

The Comptroller shall, upon appointing a receiver, cause notice to be given by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same and to make legal proof thereof. (Rev. Stat. § 5235.)

18. Distribution of Assets of Insolvent Banks.

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid

over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (Rev. Stat. § 5236.)

19. Expenses of Receivership—How Paid.

All fees for protesting the notes issued by any national banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor; but no part of the bonds deposited by such association shall be applied to the payment of such fees. All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof. (Rev. Stat. § 5238.)

20. Forfeiture of Charter.

If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate, any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation. (Rev. Stat. § 5239.)

21. Receiver May Purchase Property to Protect His Trust.

Whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly

qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale. (§ 1, act of March 29, 1886.)

That such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case and his recommendation as to the amount of money which in his judgment should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States. (§ 2.)

That whenever any such request shall be allowed as hereinbefore provided, the said Comptroller of the Currency shall be, and is, empowered to draw upon and from such funds of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest to the amount as may be recommended and allowed and for the purpose for which such allowance was made: *Provided, however,* That all payments to be made for or on account of the purchase of any such property and under any such allowance shall be made by the Comptroller of the Currency direct, with the approval of the Secretary of the Treasury, for such purpose only and in such manner as he may determine and order. (§ 3.)

22. Taxes on Insolvent National Banks Remitted.

Whenever and after any bank has ceased to do business by reason of insolvency or bankruptcy no tax shall be assessed or collected, or paid into the Treasury of the United States, on account of such bank, which shall diminish the assets thereof necessary for the full payment of all its depositors; and such tax shall be abated from such national banks as are found by the Comptroller of the Currency to be insolvent; and the Commissioner of Internal Revenue, when the facts shall so appear to him, is authorized to remit so much of said tax against insolvent state and savings banks as shall be found to affect the claims of their depositors. (Act of March 1, 1879.)

23. Appointment and Qualification of Shareholders' Agent.

Whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by ballot, in person or by proxy, each share

of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the said association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall, by the vote of a majority of the stock in value and number of shares, determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided; and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this act be discharged from any and all liabilities to such asso-

ciation and to each and all the creditors and shareholders thereof. (§ 3, act of June 30, 1876, as amended by acts of August 3, 1892, and March 2, 1897.)

24. Duties of Shareholders' Agent.

Upon receiving such deed, assignment, transfer, or other instrument, the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond. And in case any such agent so elected shall refuse to serve, or die, resign, or be removed, any shareholder may call a meeting of the shareholders of such association in the town, city, or village where the business of the said association was carried on, by giving notice thereof for thirty days in a newspaper published in said town, city, or village, or if no newspaper is there published in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and shall have executed a bond to the shareholders conditioned for the faithful performance of his duties, in the penalty fixed by the shareholders at said meeting, with two sureties, to be approved by a judge of a court of record, and file said bond in the office of the clerk of a court of record in

the county where the business of said association was carried on, he shall have all the rights, powers, and duties of the agent first elected as hereinbefore provided. At any meeting held as hereinbefore provided administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or cestui que trust. The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

“First. To pay the expenses of the execution of the trust to the date of such payment.

“Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

“Third. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent.” (§ 3, act of June 30, 1876, as amended by acts of August 3, 1892, and March 2, 1897.)

25. Illegal Preference of Creditors.

All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one

creditor to another, except in payment of its circulating notes, shall be utterly null and void. No attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court. (Rev. Stat. § 5242.)

26. Creditor's Bill Against Shareholders.

When any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established. (§ 2, act of June 30, 1876.)

27. Expenses of Failed Banks.

For the fiscal year of nineteen hundred and two and thereafter, a full and complete list of all officers, agents, clerks, and other employees of the office of the Comptroller of the Currency, including bank examiners, receivers and attorneys for receivers, and clerks employed by such examiners and receivers, or any other person connected with the work of said office in Washington or elsewhere, whose salary or compensation is paid from the Treasury of the United States or assessed against or collected from existing or failed banks under their supervision or control, shall be transmitted to the Secretary of the Interior in accordance with the provisions of an act of Congress approved January twelfth, eighteen hundred and eighty-five, relating to the Official Register: *And provided further*, That the Comptroller of the Currency is hereby directed to include in his Annual Report to the Speaker of the House of Representatives, expenses incurred during each year, in liqui-

dition of each failed national bank separately. (Act of April 28, 1902.)

DIVISION VII.

SUITS.

- | | |
|--|--|
| <ol style="list-style-type: none"> 1. General jurisdiction of national bank cases. 2. Sealed certificates of comptroller are competent evidence. 3. Certified copy of organization certificate as evidence. | <ol style="list-style-type: none"> 4. Jurisdiction of circuit courts to enjoin comptroller. 5. Suits against United States officers or agents. |
|--|--|

1. **General Jurisdiction of National Bank Cases.**

The jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun. And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby repealed. Sec. 4 of the act of March 3, 1887, provides that all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank. (§ 4 of act of July 12, 1882.)

2. **Sealed Certificates of Comptroller are Competent Evidence.**

Every certificate, assignment, and conveyance executed by

the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer. (Rev. Stat. § 884.)

3. Certified Copy of Organization Certificate as Evidence.

Copies of the organization certificate of any national banking association, duly certified by the Comptroller of the Currency and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association and of every matter which could be proved by the production of the original certificate. (Rev. Stat. § 885.)

4. Jurisdiction of Circuit Courts to Enjoin Comptroller.

The circuit courts shall have original jurisdiction of all suits brought by any banking association established in the district for which the court is held, under the provisions of Title "The National Banks," to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said Title. (Rev. Stat. § 629.)

5. Suits Against United States Officers or Agents.

All suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury. (Rev. Stat. § 380.)

The Modern Law of Banking

CHAPTER I.

NATURE AND ORGANIZATION OF A BANK.

- | | |
|--|--|
| <ol style="list-style-type: none">1. Older and modern banking law.2. Bank defined.3. Discount banking.4. Corporate banks classified.5. National bank defined.6. Savings bank defined.7. Trust company defined.8. A bank is distinct from stockholders and creditors.9. Who can engage in banking.10. Articles of association.11. Withdrawal of subscription.12. Number of required associates.13. Effect of changes among them.14. Birth of a bank. Organization certificate.15. Irregularities in organizing.16. Doing business while organizing.17. By what law banks must organize. | <ol style="list-style-type: none">18. Rights and liabilities of members of incomplete bank.19. Construction of charter.20. Knowledge of stockholders and creditors.21. Judicial recognition.22. Pleading of existence.23. Proof of existence.24. Pleading and proof of foreign bank.25. General authority.<ol style="list-style-type: none">a. To purchase bonds.b. To hold real estate.c. To create a branch.d. Miscellaneous powers.e. Cannot become a partner.f. Greater authority in closing.26. General authority within the state.27. Authority outside the state. |
|--|--|

1. Older and Modern Banking Law.

In the vast realm of law, perhaps no changes by statute and judicial decision have been more frequent and important than those in banking. The courts, less distrustful of corporations, have ceased to minimize the authority confided to managing officers by directors and stockholders. With the expansion of the methods of business, a broader meaning has been given to the phrase, scope of authority. But the greatest judicial

triumph is the discovery of a way to preserve in fullest integrity the law, and yet prevent a dishonest bank or creditor from using ultra vires as an easy mode of escaping the fulfillment of a just obligation. Finally the chief function of a bank president is no longer confined, as of yore, to the planting of a law suit, impatiently watching its slow growth, and gathering its disappointing fruitage.

2. Bank Defined.

A bank is a corporation¹ or other association, or a single individual, engaged in the business of banking.

In many states, the banking laws relating to taxation² and crime³ depart somewhat from the usual meaning given to the terms bank and banker. By these laws a bank often, though not always, includes an unincorporated bank or banker.⁴

"The business of [discount] banking," says Mr. Justice Matthews, "as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities

1 Exchange Bank v. Hines, 3 Ohio St. 1, 30. A bank usually means an incorporated bank. State v. Helmes, (Pen.) N. J. Law 764, 769 (2nd Ed.). In New York, "any man," says the Supreme Court, "may have a bank, and were it not for the restraining laws, might issue his own notes to circulate as money. The only substantial difference between them and individual bankers under the general banking laws is, that the latter may issue such circulating notes, upon certain conditions." Matter of Metcalf v. Messenger, 46 Barb. (N. Y.) 325, 328.

2 People v. Bartow, 6 Cow. (N. Y.) 290; Bank for Savings v. Collector, 3 Wall. (U. S.) 495; Western Investment Bkg. Co. v. Murray, 6 Ariz. 215; Selden v. Equitable Trust Co., 94 U. S. 419.

3 People v. Bartow, 6 Cow. (N. Y.) 290.

4 For meaning of a banker by the New York laws, see People v. Doty, 80 N. Y. 225; by the national law, Rev. Stat. §3407; relating to taxation, Selden v. Equitable Trust Co., 94 U. S. 419. By "individual banker," in Ill. statute of 1865, Banking Act, §20, is meant a bank composed of one individual only. Hunt v. Devine, 37 Ill. 137.

issued by the government, state and national, and municipal and other corporations.”⁵

3. Discount Banking.

National banks are of this character, and the greatest difference between them and state banks of deposit and discount is the note-issuing function, which is exclusively exercised by the former.⁶

4. Corporate Banks Classified.

Corporate banks may be classified as national and state; and state banks as banks of discount and deposit, savings banks and trust companies.⁷

5. Further Description of a National Bank.

A national bank is a private corporation, organized for private gain, and is not a financial agent of the government.⁸ Nevertheless it is an instrument designed “to aid the government in the administration of an important branch of the public service.”⁹ Though a national association for all practical

5 *Mercantile Bank v. New York*, 121 U. S. 138, 156. See also *Western Investment Bkg. Co. v. Murray*, 6 Ariz. 215; *Wells, Fargo & Co. v. Northern Pacific R.*, 23 Fed. 469.

6 “The principal attributes of a bank are, the right to issue circulating notes, discount commercial paper, and receive deposits of money.” *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 288; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; *N. Y. Firemen Ins. Co. v. Ely*, 2 Cow. (N. Y.) 678; *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351. The courts on many occasions have declared that the exercise of this authority is the primary function of a bank. *Bank v. Hemme Orchard & Land Co.*, 105 Cal. 376; *Bank of Sonoma Co. v. Fairbanks*, 52 Cal. 196; *State v. Louisiana Sav. Co.*, 12 La. Ann. 568; *People v. River Raisin R.*, 12 Mich. 389; *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. (U. S.) 416. See *State v. Scougal*, 3 S. Dak. 55. This conception is obviously too narrow, as no state bank or banker can issue notes. Though the law is not prohibitory, the tax of ten per cent. that must be paid is practically prohibitory and was intended to be. Rev. Stat. §3412.

7 “Banks in the commercial sense are of three kinds, to wit: first, of deposit; second, of discount; third, of circulation.” *Oulton v. Savings Institution*, 17 Wall. (U. S.) 109, 118; *Reed v. People*, 125 Ill. 592, 597; *Farmers’ & Mech. Bank v. Baldwin*, 23 Minn. 198, 203.

8 *Branch v. United States*, 12 U. S. Ct. of Claims, 281, 286.

9 *Farmers’ & Mech. Nat. Bank v. Dearing*, 91 U. S. 29, 33. The federal government “protects the bank only from such legislation as tends to

purposes, it must exercise its functions within the limits of the home state.¹⁰

On the other hand, a state cannot impair the efficiency or power of a national bank, save with the permission of Congress.¹¹ It cannot therefore regulate the transfer of national bank shares;¹² or impose taxes;¹³ or apply its statutes of limitation to any liability created by the national law;¹⁴ or require a certificate of organization;¹⁵ or regulate the penalty for taking unlawful interest;¹⁶ or convert a savings bank deposit into a preferred debt;¹⁷ or punish a national bank officer for receiving deposits when his bank is insolvent,¹⁸ or for embezzling funds,¹⁹ or for any other misdemeanor.²⁰

impair its utility as an instrumentality of the federal government. *Waite v. Dowley*, 94 U. S. 527. As regards the construction of contracts, the acquisition and transfer of property, the collection of debts and the liability to suit, the bank remains under the control of the state. *National Bank v. Commonwealth*, 9 Wall (U. S.) 353." *Munson, J., Hawley v. Hurd*, 72 Vt. 122, 125.

10 *St. Louis Nat. Bank v. Allen*, 2 McCrary (U. S.) 92, 95. See §27.

11 *Farmers' & Mech. Nat. Bank v. Dearing*, 91 U. S. 29, 34; *M'Culloch v. State*, 4 Wheat. (U. S.) 316; *Brown v. State*, 12 Wheat. 419; *Weston v. City of Charleston*, 2 Pet. (U. S.) 449, 466; *Dobbins v. Erie Co.*, 16 Pet. 435; *State v. Haight*, 31 N. J. Law 399; *City of Pittsburgh v. First Nat. Bank*, 55 Pa. 45; *Doty v. First Nat. Bank*, 3 N. Dak. 9.

12 *Doty v. First Nat. Bank*, 3 Dak. 9.

13 *Bank of Commerce v. New York City*, 2 Black (U. S.) 620; *Bank Tax Case*, 2 Wall. (U. S.) 200; *M'Culloch v. State*, 4 Wheat. (U. S.) 316; *State v. Haight*, 31 N. J. Law, 399, 413; *City of Pittsburgh v. First Nat. Bank*, 55 Pa. 45; *Bolles on National Bank Act*, §485, p. 222.

14 *Welles v. Graves*, 41 Fed. 459; *May v. Buchanan Co.*, 29 Fed. 469.

15 *First Nat. Bank v. Commonwealth*, 33 S. W. (Ky.) 1105.

16 *Farmers' & Mech. Nat. Bank v. Dearing*, 91 U. S. 29; *First Nat Bank v. Childs*, 133 Mass. 248; *Central Nat. Bank v. Pratt*, 115 Mass. 539; *Davis v. Randall*, 115 Mass. 547; *Second Nat. Bank v. Brown*, 72 Pa. 209; *First Nat. Bank v. Garlinghouse*, 22 Ohio St. 492; *Wiley v. Starbuck*, 44 Ind. 298.

Contra.—*First Nat. Bank v. Lamb*, 50 N. Y. 65. See *In re Wild*, 11 Blatchf. (U. S.) 243.

17 *Davis v. Elmira Sav. Bank*, 161 U. S. 275, revg. 142 N. Y. 590.

18 *Easton v. Iowa*, 188 U. S. 220, revg. 113 Iowa 516; *State v. Menke*, 56 Kan. 77.

Contra.—*State v. Fields*, 98 Iowa 748; *State v. Bardwell*, 72 Miss. 535, 541.

Yet a state is not entirely excluded from this field of legislation. It may authorize the seizure and sale, under execution, of national bank stock;²¹ and require a bank to transmit a list of its stockholders to a state official;²² in brief, may subject the institution to such state laws as will not impair its efficiency as a national agency.²³

6. Savings Bank Defined.

A savings bank is a state organization. Some of them have a capital, like a bank of discount, and are conducted in the same manner.²⁴ The larger number have no capital, but receive deposits and lend them on security largely specified by statute.²⁵ After deducting the expenses of management, the

19 *People v. Fonda*, 62 Mich. 401; *Allen's Appeal*, 119 Pa. 192; *In re Eno*, 54 Fed. 669.

Contra.—*Hoke v. People*, 122 Ill. 511.

20 *Allen v. Carter*, 119 Pa. 192; *Commonwealth v. Ketner*, 92 Pa. 372; *Commonwealth v. Felton*, 101 Mass. 204. See *State v. First Nat. Bank*, 2 S. Dak. 568.

21 *Braden's Estate*, 165 Pa. 184.

22 *Newman v. Wait*, 46 Vt. 689.

23 *Cogswell v. Second Nat. Bank*, 76 Conn. 252.

24 *Mitchell v. Beckman*, 64 Cal. 117; *State v. Lincoln Sav. Bank*, 14 Lea (Tenn.) 42. In California savings banks exist having a capital and stockholders who are liable for the bank indebtedness very much like the stockholders of other banks. Between them and their depositors exists the debtor and creditor relation. *Wells v. Black*, 117 Cal. 157; *Los Angeles v. State Loan & Trust Co.*, 109 Cal. 396; *McGowan v. McDonald*, 111 Cal. 57.

25 *Huntington v. Savings Bank*, 96 U. S. 388; *Dodd v. Una*, 40 N. J. Eq. 672, 707; *Williams v. McKay*, 40 N. J. Eq. 189; *Hannon v. Williams*, 34 N. J. Eq. 255. "Deposits are not stock, within the most enlarged use of the word, nor are they regulated as such, but are more like deposits in other banks, drawing a stipulated interest." *Bank v. Town of New London*, 20 Conn. 111, 117. In Colorado, "under our statute, savings banks so-called, can only be organized as concerns with a capital stock of not less than \$25,000, or more as the organizers may determine. Where they comply in all other respects with the act, they are entitled to receive deposits. When a deposit is made, the depositor does not thereby become entitled to all the accretions of the business. The assets and property, the gain and profit, are not his. His deposit is made subject to the right to receive such interest as the directors may agree to pay. Power to determine what they will pay is left to the directors and the balance may be divided

profits are distributed among the depositors.²⁶ The surplus accumulated by some savings banks consists, rather of unclaimed deposits, than of the reservation of earnings. Whether a bank is a savings institution depends not on its name, but on its functions.²⁷ And though partaking of a charitable nature,²⁸ it cannot be incorporated under a statute authorizing the creation of benevolent and charitable societies.²⁹ Lastly in New York it is unlawful "to advertise or put forth a sign as a savings bank, or in any way to solicit or receive deposits as a savings bank," unless the institution is incorporated and conducted in a bona fide manner, as the law prescribes.³⁰

7. Trust Company Defined.

A trust company is a bank with additional powers.³¹ The departure from the usual functions of banking, besides the non-issue of notes, is the mode of lending. Their authority in

among the stockholders as resulting profit in shape of dividends." *Colo. Sav. Bank v. Evans*, 12 Colo. App. 334; 340.

26 *People v. Binghamton Trust Co.*, 139 N. Y. 185, 192.

27 *State v. Lincoln Sav. Bank*, 14 Lea (Tenn.) 42. Authority to married women and minors to convert at their option their deposits when reaching \$100 into stock does not denote a savings bank. *Ibid.*

28 *People v. Binghamton Trust Co.*, 139 N. Y. 185, 192.

29 *Sheren v. Mendenhall*, 23 Minn. 92.

30 *People v. Binghamton Trust Co.*, 139 N. Y. 185.

31 For the distinction between a bank and trust company, see *Dietrich v. Rothenberger*, 75 S. W. (Ky.) 271. In *Hamilton Nat. Bank v. Am. Loan & Trust Co.*, 66 Neb. 67, a corporation made negotiable loans, purchased and sold notes, mortgages, stocks and bonds, borrowed money, received deposits, executed trusts and transacted much of the business of a loan and trust company and thus designated itself. But it was declared to be a bank, and its stockholders were liable to the creditors like those of other banking associations. A trust company can issue a certificate of deposit. *Bank v. Title & Trust Co.*, 105 Fed. 491. In New York a promissory note may be transferred to a trust company, which has power to sue and recover thereon from the maker. *Binghamton Trust Co. v. Clarke*, 32 N. Y. App. Div. 151; *Binghamton Trust Co. v. Auten*, 68 Ark. 294. In Missouri a trust company can receive deposits and pay interest thereon, and pay checks on demand, but cannot receive general deposits like a bank without paying interest on them. *State v. Lincoln Trust Co.*, 144 Mo. 562.

this regard is extensive,³² but collateral security for loans is generally required.³³ Trust companies usually possess larger powers than banks; and execute a great variety of important trusts that are outside the province of state or national banking associations.³⁴ In many statutes relating to bank taxation³⁵ and taking bank deposits, trust companies are classed outside the pale of banking institutions.³⁶

8. Bank is Distinct From Stockholders and Creditors.

A fully incorporated bank is a legal entity; a creation during solvency, quite distinct in many regards from its stockholders, officers and creditors. Though the stockholders contribute the capital, after payment, it no longer belongs to them, but to the bank. "It holds its property," says Justice Brewer, "as any individual holds his,—free from the touch of a stockholder who, though equitably interested in, has no legal right to, the property."³⁷

The relationship between a bank and its directors and other officers is that of agency; the same rights and liabilities existing in many cases as between an individual agent and an individual principal. While the officers are often called trustees, the term must be applied to them in the same sense as to individual agents of personal principals.³⁸

The bank's relationship to depositors is that of debtor and creditor; between them and the bank's officers there is no legal

32 *Binghamton Trust Co. v. Clark*, 52 N. Y. Supp. 941; *Binghamton Trust Co. v. Auten*, 68 Ark. 294.

33 *Pratt v. Short*, 79 N. Y. 437; *N. Y. State Loan & Trust Co. v. Helmer*, 77 N. Y. 64.

34 In Missouri a trust company has power to execute a note for the benefit of a railroad company which it is financing. *First Nat. Bank v. Guardian Trust Co.*, 86 S. W. 109.

35 See *Mercantile Bank v. New York*, 121 U. S. 138; *Selden v. Equitable Trust Co.*, 94 U. S. 419.

36 *State v. Reid*, 125 Mo. 43.

37 *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 383.

38 See Chap. VIII. §40.

relationship; they are strangers. And the same thing may be said of all other creditors.³⁹

Furthermore, so long as it remains solvent, the bank holds its property, like an individual, free from the touch of a creditor who has acquired no lien.⁴⁰

9. Who Can Engage in Banking.

At common law any one can engage in banking,⁴¹ yet the state can regulate the business, and forbid all who will not conform to the public regulations.⁴² Furthermore, a corporation organized for a specific purpose, like a railroad,⁴³ steamboat,⁴⁴ mining,⁴⁵ insurance,⁴⁶ or library company,⁴⁷ under the general laws, cannot engage in banking. Such a corporation may be also authorized to do a banking business.⁴⁸ Authority to lend its surplus funds,⁴⁹ draw and sell drafts,⁵⁰ grant evi-

39 "The directory of a going corporation, whether able to pay its debts or not, owe no allegiance to the [creditors]. They are strangers to the directors. They maintain no fiduciary relation with them; there is a lack of privity between the two." Beard, J., *Deaderick v. Bank*, 100 Tenn. 457, 464.

40 *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 383.

41 *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519; *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371, 377; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; *State v. Scougal*, 3 S. Dak. 55; *State v. Williams*, 8 Tex. 255; *Nance v. Hemphill*, 1 Ala. 551; *Ohio Life Ins. & Trust Co. v. Merchants Ins. & Trust Co.*, 11 Humph. (Tenn.) 1, 23. An agreement by the vendors of a banking business not to start a new bank in the same town is broken by the action of one of them in subscribing to stock and accepting a position in a new bank. *Merica v. Burget*, 36 Ind. App. 453.

42 Chap. 11. §6. *Blaker v. Hood*, 53 Kan. 499; *Pape v. Capitol Bank*, 20 Kans. 440; *Cummings v. Spaunhorst*, 5 Mo. App. 21; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; *State v. Woodmansee*, 1 N. Dak. 246; *State v. Richcreek*, 77 N. E. (Ind.) 1085. In Ohio, artificial as well as natural persons may pursue the business of banking, with the single exception of issuing notes for circulation as money. *Corwin v. Urbana Mutual Ins. Co.*, 14 Ohio 6, 12. The right to do a banking business is not a franchise, but the right to do this through a corporation can be exercised only by express permission of the state. *Bank of California v. City of San Francisco*, 142 Cal. 276, 278, 279. A state may require that a banker, or a member of a banking firm, doing business within the state, shall reside therein, so that civil and criminal jurisdiction can at all times be exer-

dences of debt,⁵¹ hold, sell or mortgage real or personal estate,⁵² will not justify a corporation in issuing circulating notes or undertaking other banking business. But a corporation that borrows or lends for its own use⁵³ is not engaged in banking.⁵⁴

10. Articles of Association.

The articles of association are a statutory agreement among the subscribers,⁵⁵ and a material alteration without the consent

cised. *State v. Richcreek*, 77 N. E. (Ind.) 1085. What regulations are proper and needful is primarily for legislative decision. *Ibid*

43 *People v. River Raisin R.*, 12 Mich. 389.

44 *State v. Stebbins*, 1 Stew. (Ala.) 299.

45 *Smith v. State*, 21 Ark. 294.

46 *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559. See *Memphis City Bank v. State of Tennessee*, 161 U. S. 186. In New York an insurance company has no authority to loan money on notes or other securities in any other way than that described in its charter. *N. Y. Firemen's Ins. Co. v. Ely*, 2 Cow. 678.

47 *State v. Wash. Social Library Co.*, 11 Ohio 96; *State v. Granville Alex. Society*, 11 Ohio 1.

48 *Kiggins v. Munday*, 19 Wash. 233.

49 *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; *Lycoming Fire Ins. Co. v. Newcomb*, 1 Leg. Chron. (Pa.) 409.

50 *Smith v. State*, 21 Ark. 294.

51 *People v. River Raisin R.*, 12 Mich. 389.

52 *State v. Granville Alex. Society*, 11 Ohio 1.

53 *People v. Brewster*, 4 Wend. (N. Y.) 498; *Oregon Trust & Invest. Co. v. Rathbun*, 5 Saw. (U. S.) 32.

Contra.—*Phila. Loan Co. v. Towner*, 13 Conn. 249.

In Texas, the constitutional provision, prohibiting the legislature from creating corporations with discounting privileges, does not render the discounting of a note by a corporation illegal. Consequently it is not precluded from recovering on such a note. *Texas Loan Agency v. Hunter*, 13 Tex. Civ. App. 402.

54 *Barry v. Merchants' Ex. Co.*, 1 Sand Ch. (N. Y.) 280; *Life Association v. Levy*, 33 La. Ann. 1203; *Hubbard v. New York & Harlem R.*, 36 Barb. (N. Y.) 286.

55 *Kaiser v. Lawrence Sav. Bank*, 56 Iowa 104; *Corey v. Morrill*, 61 Vt. 598.

of all, after subscribing and before completing the organization, releases non-consenting subscribers.⁵⁶ Furthermore, an alteration, either in the way of increase or decrease of the proposed capital would be material.⁵⁷ If one has paid his subscription before the alterations were made, or in ignorance of them, he can recover it.⁵⁸

11. Withdrawal of Subscription.

A subscription, until the entire amount is secured, is a mere proposition or offer, and may be withdrawn.⁵⁹ "It is not," says Justice Allen, "on the ground that there was no sufficient consideration. . . . But it is on the ground that for the time being and until the corporation is organized, the writing does not take effect as a contract."⁶⁰

12. Number of Required Associators.

The mode of incorporating a bank is regulated by positive law. By this the association of persons is essential; an individual cannot transform himself into a corporation,⁶¹ nor can he multiply his individuality by calling himself a president and

⁵⁶ *Burrows v. Smith*, 10 N. Y. 550; *Dorris v. Sweeney*, 60 N. Y. 463; *Baker v. Ft. Worth Board of Trade*, 8 Tex. Civ. App. 560; *Railway Co. v. Allerton*, 18 Wall. (U. S.) 233; *Newport Cotton Mill Co. v. Mims*, 103 Tenn. 405; *Katama Land Co. v. Jernegan*, 126 Mass. 155; *Atlantic Cotton Mills v. Abbott*, 9 Cush. (Mass.) 423; *Norwich Lock Mfg. Co. v. Hockaday*, 89 Va. 557 and cases cited; *Stevens v. London Steel Works Co.*, 15 Ont. (Can.) 75; *Downes v. Ship, L. R. 3 H. of L. (Eng.)* 343, 356. What is a sufficient subscription to bind the subscribers. *Cole v. Ryan*, 52 Barb. (N. Y.) 168. See note 12 Eng. & Am. Corp. Cases (N. S.) 213.

⁵⁷ *Matthews v. Columbia Nat. Bank*, 79 Fed. 558; *Stearns v. Sopris*, 4 Colo. App. 191.

⁵⁸ *Matthews v. Columbia Nat. Bank*, 79 Fed. 558.

⁵⁹ *Sterns v. Sopris*, 4 Colo. App. 191; *Temple v. Lemon*, 112 Ill. 51; *Ridgefield & New York R. v. Reynolds*, 46 Conn. 375.

⁶⁰ *Hudson Real Estate Co. v. Tower*, 156 Mass. 82, and 161 Mass. 10; *Bryant's Pond Steam Mill Co. v. Felt*, 87 Me. 234; *Carr v. Bartlett*, 72 Me. 120; *Phipps v. Jones*, 20 Pa. 260; *Muncy Engine Co. v. De La Green*, 143 Pa. 269; *Balfour v. Baker City Gas Co.*, 27 Or. 300; *Holt v. Winfield Bank*, 25 Fed. 812.

⁶¹ *Longfellow v. Barnard*, 58 Neb. 612; *Louisville Bkg. Co. v. Eisenman*, 94 Ky. 83, 89.

cashier.⁶² By some states this is positively forbidden.⁶³ By the national law, a bank must have at least five stockholders.⁶⁴

13. Effect of Changes Among Them.

After perfecting the organization, its corporate existence is not affected by changes in the personnel of its members.⁶⁵ Notwithstanding these it is the same entity with unchanged rights and liabilities.⁶⁶ Not even the subsequent purchase of all the stock by one member changes its corporate existence⁶⁷ and liability. The corporate entity still remains and can act in many respects as before. For example, should a corporate bank be taxed differently from an individual banker, the law taxing corporate banks would doubtless apply to such an institution. Or, should a state subject bank stockholders to double liability for its indebtedness, a sole stockholder who is perpetuating the corporation for the purpose of reaping some advantage could hardly escape, should the bank fail, from assessment.⁶⁸ The corporation is, in truth, in abeyance and may multiply its

62 Longfellow case, 58 Neb. 612.

63 Ky. Gen. Stat. Ct. 56, §1.

64 Rev. Stat. §5133.

65 Mathis v. Morgan, 72 Ga. 517, 525; Newton Mfg. Co. v. White, 42 Ga. 148; Russell v. M'Lellan, 14 Pick. (Mass.) 63, 70.

66 Ibid. The sole ownership of all the stock by one individual at the time of lending a man money and taking his note, is no defence to an action brought by a subsequent purchaser from the bank's receiver against the maker. Shabata v. Johnston, 53 Neb. 12. A corporation that has directors, though all the stock is owned by one man, must execute a mortgage by their authority; action by the sole owner will not suffice. Union Nat. Bank v. State Nat. Bank, 155 Mo. 95. See Union Nat. Bank v. Shoemaker, 68 Mo. App. 597.

67 First Nat. Bank v. Winchester, 119 Ala. 168; Parker v. Bethel Hotel Co., 96 Tenn. 252; Stagg v. Taylor, 68 S. W. (Ky.) 863; Durlacher v. Frazer, 8 Wy. 58; Button v. Hoffman, 61 Wis. 20; Park v. Richmond Turnpike Co., 10 Ky. L. Rep. 384; Winona R. v. St. Paul R., 23 Minn. 359; Mathis v. Morgan, 72 Ga. 517, 525; Wilde v. Jenkins, 4 Paige (N. Y.) 481. See note 19 L. R. A. 684.

68 "The corporate and individual property are ordinarily alike liable for the payment of any debt contracted by the owner, and subsequent purchasers of the stock take it subject to the liens or equities of the creditors of the sole owner created prior to the transfer of the stock to them." Louisville Bkg. Co. v. Eisenman, 94 Ky. 83, 94.

membership and expand at the will of the owner.⁶⁹ It is doubtless true that it cannot be permanently preserved in this manner;⁷⁰ this is simply a transitory stage, either to future expansion with new members, or to retirement and death.

Indeed, while the ownership of stock is thus concentrated in one person, the corporation is in a state of suspended animation; its seeming activity is that of the owner masked under the corporate name. Not until he parts with some of his stock to others who unite with him in electing new officers is the corporate creature resuscitated and able to put forth its proper activity.⁷¹

There is a just limitation to this principle. As the Court of Appeals of Maryland has well said: "The law will not in any case suffer the corporate name—the mere shadow—to be interposed for the purpose of defeating substantial rights depending for the ultimate vindication not upon the accidental form of a transaction, but upon its inherent equity and justice."⁷² Thus a mortgage given by a corporation owned by one man was declared to be invalid as a corporate mortgage, but valid as a personal obligation.⁷³ Likewise a partner of a banking firm who happened to be the sole owner of a corporation, and both concerns failed, the separate creditors of the corporation were entitled to priority of its assets over the creditors of the firm.⁷⁴

14. Birth of a Bank. Organization Certificate.

The birth of a bank dates from its organization certificate,⁷⁵ yet failure to file it within the appointed time cannot be urged

⁶⁹ *First Nat. Bank v. Winchester*, 119 Ala. 168.

⁷⁰ Or kept going in that way to commit a fraud. *Louisville Gas Co. v. Kaufman*, 105 Ky. 131, 159. See *Given v. Times-Rep. Printing Co.*, 52 C. C. A. 40.

⁷¹ *Swift v. Smith*, 65 Md. 428; *Bellona Co. case*, 3 Bland (Md.) 442, 446.

⁷² *Pott v. Schmucker*, 84 Md. 535, 553.

⁷³ *Ex parte Collinge*, 4 De Gex, Jones & Sm. (Eng.) 533.

⁷⁴ *Pott case*, 84 Md. 535.

⁷⁵ *Rehbein v. Rahr*, 109 Wis. 136; *State v. Mason*, 61 Kan. 102; *Burrows v. Smith*, 10 N. Y. 550, 555-557; *Valk v. Crandall*, 1 Sand. Ch. (N.

as proof of the bank's non-existence against the patent fact of its active business life.⁷⁶ Furthermore, defects that may exist in the certificate furnish no shield of defence to stockholders or officers for not fulfilling their duties.⁷⁷ As the certificate is filed for the enlightenment and protection of the public, stockholders cannot contradict it in an action against them by the bank's creditors.⁷⁸ The failure to file one, or such an one as the law requires, is an omission or imperfect performance of duty for the state alone to redress.⁷⁹

15. Irregularities in Organizing.

Mere irregularities in organizing a bank will not jeopardize its existence, nor make the stockholders and officers personally liable. What irregularities in organization are to be deemed too grave for the law to overlook can only be learned by a study of the cases. In more than one of them courts have looked on the same irregularity in different ways.⁸⁰

Y.) 179; *Palmer v. Lawrence*, 3 Sand. (N. Y.) 161; *Queen City Furniture Co. v. Crawford*, 127 Mo. 356; *National Bank v. Texas Investment Co.*, 74 Tex. 421; *Ryland v. Hollinger*, 54 C. C. A. 248; *Wechselberg v. Flour City Nat. Bank*, 12 C. C. A. 56. The same rule applies to a national bank. *Rev. Stat. §§5133-5136*; *Regester v. Medcalf*, 71 Md. 528.

⁷⁶ *State v. Mason*, 61 Kan. 102; *Williams v. Union Bank*, 2 Humph. (Tenn.) 339; *Jennings v. People*, 8 Mich. 81; *State v. Fitzsimmons*, 30 Mo. 236; *State v. Carr*, 5 N. H. 367; *Leonardsville Bank v. Willard*, 25 N. Y. 574; *People v. Chadwick*, 2 Park. Crim. (N. Y.) 163; *Dennis v. People*, 1 Park. Crim. 469. See *People v. Perrin*, 56 Cal. 345; *Bank v. Allen*, 11 Vt. 302. See §23.

⁷⁷ *Bank v. Darling*, 91 Hun (N. Y.) 236; *Pape v. Capitol Bank*, 20 Kan. 440; *State v. Mason*, 61 Kan. 102; *Rehbein v. Rahr*, 109 Wis. 136.

⁷⁸ *Thompson v. Reno Sav. Bank*, 19 Nev. 103; *Allibone v. Hager*, 46 Pa. 48.

⁷⁹ *Bank v. Darling*, 91 Hun (N. Y.) 236; *McFarlan v. Triton Ins. Co.*, 4 Denio (N. Y.) 392. A certificate setting forth that the company is to act as trustee for persons, firms, and corporations in the issue of bonds, mortgages and other capacities, "is within the prohibition of a statute providing for the creation of corporations in general, but expressly excluding banks and trust companies." *McCarter v. Imperial Trustee Co.*, 72 N. J. Law 42.

⁸⁰ *Bartholomew v. Bentley*, 1 Ohio St. 37; *Mahoney v. State Bank*, 4 Ark. 620. In *Valk v. Crandall*, 1 Sand. Ch. (N. Y.) 179, it was held that

A bank incorporated in good faith, yet unintentionally omitting some of the prescribed steps, cannot be punished at the instance of a debtor-subscriber by relieving him from the payment of a just obligation. The state, not the debtor, is the guardian of the public honor, and has provided an adequate remedy without requiring him to sacrifice his virtue.⁸¹

a banking association whose organization certificate was not signed by the stockholders in compliance with law had no legal existence. In *Mason v. Stevens*, 16 S. Dak. 320, though the bank's certificate of organization was not filed with the proper state officer, it had a legal existence. In *Kaiser v. Lawrence Sav. Bank*, 56 Iowa 104, the articles of association were not properly signed, and were fatally defective in other respects. The omission to state the amount of capital stock is a material omission. See *People v. Perrin*, 56 Cal. 345. In Nebraska the neglect to file articles was fatal to the corporation's existence, which could be questioned collaterally. *Lusk v. Riggs*, 97 N. W. 1033 (1904). Directors of a bank completely organized who accept the certificate of the controller, authorizing the bank to open its doors, are not liable as partners to a lessor of a place for doing the business of the bank. *Seeberger v. McCormick*, 178 Ill. 404, affg. 73 Ill. App. 87. In *Commonwealth v. McKean Co. Bank*, 32 Pa. 185, a legislature authorized any three of nine commissioners to organize a bank. A majority of the entire number transferred the franchise to the citizens of another State without any bona fide subscription to the stock. Nevertheless the organization effected by a minority of three was valid. In *Kinsela v. Cataract City Bank*, 18 N. J. Eq. 158, "seven (or more) citizens" of New Jersey associated to establish a bank, and executed and recorded an organization certificate stating that they had elected one of their number to be president. The association began business without further organization except the appointment of a cashier. The signers were regarded as associates, incorporators or stockholders, and not managers, which the law required every bank to have, and that the transaction of business by them, or by the president alone, was wrongful. In Maryland a statute provided that all chartered banks which had not organized and paid a tax within a prescribed period should be presumed to have forfeited them. Nevertheless a trust company which did organize within the period, but neglected to pay the tax, possessed a legal existence. *Murphy v. Weatley*, 63 At. (Md.) 62.

81 *Pape v. Capitol Bank*, 20 Kan. 440; *Pine River Bank v. Hodson*, 46 N. H. 114; *Bank v. Darling*, 91 Hun (N. Y.) 236; *Utica Ins. Co. v. Hunt*, 1 Wend. (N. Y.) 56; *Utica Ins. Co. v. Cadwell*, 3 Wend. 296; *Utica Ins. Co. v. Pardow*, 2 Hall (N. Y.) 515; *Marion Sav. Bank v. Dunkin*, 54 Ala. 471; *Southern Bank v. Williams*, 25 Ga. 534; *Snyder v. State Bank*, 1 Ill. 161; *Smith v. Mississippi R.*, 6 Sm. & M. (Miss.) 179; *Central Trust Co. v. Cook Co. Nat. Bank*, 15 Fed. 885.

16. Doing Business While Organizing.

A national bank while organizing can do only things necessary and incidental to its organization until authorized to act by the controller.⁸² It cannot therefore make a long lease of a banking office;⁸³ or a contract with another for cashing its checks.⁸⁴

17. By What Law Banks Must Organize.

Again, wherever a special law exists for enabling individuals to organize banks, they cannot organize under a general law providing for the creation of corporations.⁸⁵ Lastly, the authority of an extended bank relates back, and covers all acts that are within its broader domain.⁸⁶

18. Rights and Liabilities of Members of Incomplete Bank.

A bank organization may be so incomplete, or be organized so imperfectly, that no valid corporation exists answerable for the debts contracted by its agents. How can the creditors proceed against the organizers? On this question the courts have parted company.⁸⁷

By one rule the agents are liable as partners;⁸⁸ by the other,

82 *First Nat. Bank v. Armstrong*, 42 Fed. 193. A corporation is by implied contract liable for services needful in forming it, or rendered afterward in furthering its business. *Farmers' Bank v. Smith*, 105 Ky. 816; *Low v. Conn. & Passumpsic R.*, 45 N. H. 370; *Bell's Gap R. v. Christy*, 79 Pa. 54.

83 *McCormick v. Market Bank*, 165 U. S. 538, affg. 162 Ill. 100.

84 *Armstrong v. Second Nat. Bank*, 38 Fed. 883. A state bank that has not received a certificate of authority to transact business may negotiate promissory notes. *Kellogg v. Douglass Co. Bank*, 58 Kan. 43.

85 *Workingmen's Accommodation Bank v. Converse*, 29 La. Ann. 369. An insurance company containing no banking clause, does not violate its charter by receiving money on deposit. *Corwin v. Urbana Mutual Ins. Co.*, 14 Ohio 6.

86 *Blair v. Metropolitan Sav. Bank*, 27 Wash. 192. See Chap. II. §4.

87 All courts hold them liable. *Wechselberg v. Flour City Nat. Bank*, 12 C. C. A. 56, 60. In organizing a bank, a director who is guilty of no act or omission by which the party extending the credit is misled is not liable. But if he should assert that the bank was legally organized, when the fact was otherwise, and thereby mislead a creditor, he would be responsible for his wrongful assertion. *Corey v. Morrill*, 61 Vt. 598.

88 *McLennan v. Anspaugh*, 2 Kan. App. 269; *Pettis v. Atkins*, 60 Ill.

every one purporting to act as agent, though in truth without authority, is solely responsible for his acts.⁸⁹ The former rule has been applied by many state and federal tribunals to banking institutions. The other rule rests on a very old and sound foundation, that any one purporting to act as agent of a non-existing principal, becomes the principal himself and liable in that capacity. The strong tendency is to apply the partnership rule to such contracts.

It is certain that in making such contracts both parties rely on the responsibility of the future corporation. And if it never appears, an association still exists composed of the members of the intended enterprise. It is true that this does not have definite form and cohesion. But is it not more consonant with justice to hold all the members responsible for what has been done, rather than those who happen to have acted for all in making contracts? Are not those who thus acted in a very true sense agents for the entire number? Besides, wherever

454; *Bigelow v. Gregory*, 73 Ill. 197; *Flagg v. Stowe*, 85 Ill. 164; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416, 424; *Field v. Cooks*, 16 La. Ann. 153; *Coleman v. Coleman*, 78 Ind. 344; *Gainey v. Gilson*, 149 Ind. 58; *Frost v. Walker*, 60 Me. 469; *Hill v. Beach*, 12 N. J. Eq. 31; *Queen City Furniture Co. v. Crawford*, 127 Mo. 356; *Martin v. Fewell*, 79 Mo. 401, 411; *Hurt v. Salisbury*, 55 Mo. 310; *Garnett v. Richardson*, 35 Ark. 144; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa 104; *Lewis v. Tilton*, 64 Iowa 220; *Fredendall v. Taylor*, 26 Wis. 286; *Fuller v. Rowe*, 57 N. Y. 23; *Wells v. Gates*, 18 Barb. (N. Y.) 554; *Jessup v. Carnegie*, 44 N. Y. Super. Ct. 260; *Wechselberg v. Flour City Nat. Bank*, 12 C. C. A. 56. See *Ryland v. Hollinger*, 54 C. C. A. 248, and 2 Cook on Corp. §508. A creditor who has dealt with a de facto bank in its corporate name and given credit thereto cannot charge its members as partners with its debts. *Richards v. Minn. Sav. Bank*, 75 Minn. 196; *Finnegan v. Noerenberg*, 52 Minn. 239; *Johnson v. Okerstrom*, 70 Minn. 303.

⁸⁹ *Planters & Miners' Bank v. Padgett*, 69 Ga. 159; *Fay v. Noble*, 7 Cush. (Mass.) 188; *Trowbridge v. Scudder*, 11 Cush. 83; *First Nat. Bank v. Almy*, 117 Mass. 476; *Ward v. Brigham*, 127 Mass. 24; *Lawler v. Murphy*, 58 Conn. 294, 313; *Trust Co. v. Floyd*, 47 Ohio St. 525; *Johnson v. Corser*, 34 Minn. 355; *Ash v. Guie*, 97 Pa. 493; but see *Hess v. Werts*, 4 Serg. & R. (Pa.) 356. The New York cases are contradictory, the later determinations favoring the partnership rule. See *Allen v. Sewall*, 2 Wend. 327, 338; *Ex Parte Van Riper*, 20 Wend. 614; *Moss v. Oakley*, 2 Hill 265, 269; *Bailey v. Bancker*, 3 Hill, 188; *Harger v. McCullough*, 2 Denio 119, 123; *Walker v. Bank*, 9 N. Y. 582.

the agency principle prevails, the one who pays has a right to compel contributions from the others. Is not the cause of justice best promoted by holding all of them primarily liable, thus avoiding circuity of action?

But when a *de jure* corporation afterward disappears, the Supreme Court of Illinois has declared that the directors are individually liable for a contract they may have made as partners.⁹⁰

To the case of an incomplete corporation another principle may be applied of no little importance. When directors make a contract with an individual who is ignorant of the bank's incomplete condition, but who from their conduct is justified in supposing otherwise, though they do not try to conceal the truth from him, he may hold them after the bank has been abandoned or ended in an action on their implied warranty of power to execute the contract they had undertaken.⁹¹

Lastly by statute in some states stockholders are liable for the failure of the bank to organize properly and to give notice of its existence. Nor can a member of such an association escape because he does not appear as a subscriber to its stock.⁹²

19. Construction of Charter.

Formerly, when the evil consequences of exercising corporate power were more greatly feared, the acquisition of banking privileges was more difficult, and they were more narrowly construed. At all times a bank charter has been deemed a contract between the stockholders and the state,⁹³ and has been

90 Seeberger v. McCormick, 178 Ill. 404.

91 Seeburger v. McCormick, 178 Ill. 404, affg. 73 Ill. App. 87. In some cases an action on the case for deceit would lie against them and be a more appropriate remedy. See Mechem on Agency, §549.

92 Abbott v. Omaha Smelting Co., 4 Neb. 416, containing a thorough consideration of the subject; Porter v. Sherman County Bkg. Co., 36 Neb. 271.

93 Bank v. Commonwealth, 19 Pa. 144; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518. "The powers and capacities of a corporation are derived solely from its charter, which, like any other statute, is to be construed as an entirety, and with a view to ascertain the intention of the legislature, and, if practicable, to harmonize its various provisions; and

construed strictly against them, and liberally in favor of the state.⁹⁴

No privileges or powers are implied.⁹⁵ But statutes that apply to bank officers shadowed with some kind of penalty, are always construed liberally, in harmony with the general rule, in favor of the transgressor.⁹⁶ A charter cannot be adjudged void and inoperative in an indirect proceeding; this can be done only by the state.⁹⁷

On many occasions the charters of banks have been construed,—their authority to make loans, establish by-laws, and other matters.⁹⁸ So far as these constructions possess more than a momentary value, they have been noticed in connection with the topics to which they particularly relate. The nature and character of a corporate bank must be determined from the articles of association, and cannot be changed or modified by parol evidence.⁹⁹

if upon a fair construction of its charter, the power to do the act or to make the contract under consideration, is not expressly given, nor clearly implied from the granted powers, the power cannot be said to exist." *Peck, J., White's Bank v. Toledo Ins. Co.*, 12 Ohio St. 601, 605. See 2 *Morawetz on Priv. Corp.* §1054.

94 *City of Goodland v. Bank of Darlington*, 74 Mo. App. 365; *State v. Murphy*, 130 Mo. 10. See cases in next note.

95 *State v. Gibbs*, 3 McCord (S. C.) 377; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560; *Nicollet National Bank v. Frisk-Turner Co.*, 71 Minn. 413; *Weckler v. First National Bank*, 42 Md. 581; *Bank v. Commonwealth*, 19 Pa. 144; *Bartholomew v. Bentley*, 1 Ohio St. 37; *Bank v. Swayne*, 8 Ohio 257, 286; *Lathrop v. Commercial Bank*, 8 Dana (Ky.) 114, 119; *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *Thweatt v. Bank*, 81 Ky. 1; *Talmage v. Pell*, 7 N. Y. 328; *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351, 382. See *Branch of State Bank v. Debolt*, 1 Ohio St. 591. Corporations have the powers that are specifically granted, and such others as are necessary for carrying the specific powers into effect, but none others. *State v. Granville Alex. Society*, 11 Ohio 1, 12; *State v. Stebbins*, 1 Stew. (Ala.) 299.

96 *Bristol v. Barker*, 14 Johns. (N. Y.) 205; *People v. Brewster*, 4 Wend. (N. Y.) 498; *People v. Bartow*, 6 Cow. (N. Y.) 290.

97 *Selma & Tennessee R. v. Tipton*, 5 Ala. 787.

98 *Ward v. Johnson*, 15 Ill. 215, contains a construction of many points in a bank's charter.

99 *Gould v. Fuller*, 79 Minn. 414; *Craig v. Benedictine Hospital*, 88 Minn. 535.

20. Knowledge of Stockholders and Creditors.

The stockholders¹ and creditors² of a bank are presumed to know the provisions of its charter, amendments and other organic laws.³ The stockholders and managers⁴ only are presumed to have a knowledge of its by-laws; consequently, they only are affected by them.⁵ But creditors who learn what they are become bound in the same manner as the stockholders.⁶

This principle is only an application of the more general one, that the people of a state are presumed to know its laws, especially its statutes. It is true that in many ultra vires transactions between corporate banks and individuals this principle is not applied, but its existence is recognized⁷ while its application is left to the state in other forms of action.

While all statutes and public doings are equally within the knowledge of every one,—those who transact business with a

1 *Crandall v. Lincoln*, 52 Conn. 73, 100.

2 *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 28; *Bank v. Smedes*, 3 Cow. (N. Y.) 662; *Hoyt v. Thompson*, 19 N. Y. 207; *Hays v. Bank, Martin & Yerg.* (Tenn.) 179; *Bohmer v. City Bank*, 77 Va. 445; *Royal Bank of India's Case*, L. R. 4 Ch. App. (Eng.) 252.

3 *Ibid.* *Dempster Mfg. Co. v. Downs*, 101 N. W. (Iowa) 735.

4 *Bank v. Wollaston*, 3 Har. (Del.) 90; *Brent v. Bank*, 10 Pet. (U. S.) 596; *Dempster case*, 101 N. W. 735.

5 *Mechanics & Farmers' Bank v. Smith*, 19 Johns. (N. Y.) 115; *Driscoll v. West Bradley Mfg. Co.*, 59 N. Y. 96; *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Pitot v. Johnson*, 33 La. Ann. 1286, 1287; *Bank v. Pinson*, 58 Miss. 421, 435, 436; *Wild v. Bank*, 3 Mason (U. S.) 505, 506; *Royal Bank of India's Case*, L. R. 4 Ch. App. (Eng.) 252; *Goetz v. Knie*, 103 Wis. 366, 370; 2 Cook on Corp. §725.

6 See *Bell & Coggeshall Co. v. Ky. Glass Works Co.*, 106 Ky. 7, 15-17. Strangers are presumed to have knowledge of by-laws that are recorded in a public office. *Dempster Mfg. Co. v. Downs*, 101 N. W. (Iowa) 735.

7 "If a person enters into a business transaction with a national bank, or any other corporation, he is bound to take notice of the nature and extent of its corporate powers, and of the purpose for which it was organized; and if the transaction in question is in excess of these powers, he has no right to assume without inquiry that a guaranty executed by its cashier, or by any other officer, in the course of such transaction, is executed with the sanction and approval of the corporation." *Thayer, Cir. J., Farmers' & Merch. Nat. Bank v. Smith*, 23 C. C. A., 80, 86.

corporate bank as well as its own members,—another principle closely related must be presented. It may not always be convenient for the outside party to learn by independent inquiry what are the public limitations applying to the bank; and in many cases he is justified in making this inquiry of a proper officer of the corporation. If this is done and an answer is given, the bank will be bound thereby, for such knowledge is peculiarly within his ken, and can be imparted without difficulty. This principle has been applied to a corporation or its officers who made a lease without informing the lessor that the certificate of incorporation, needed to perfect the organization, had not been obtained. He could have learned by inquiry of the proper state officer, but assuming from the desire of the officers to make a lease that the certificate had been obtained, they were held as though they had given the information and misled the inquirer.⁸

21. Judicial Recognition.

Judicial notice of charters granted to private corporations generally has been singularly sinuous; legislation pertaining to bank corporations has often received judicial recognition. The reason is that banks, with the peculiar endowment of the note-issuing function, have been regarded as possessing a more public character. Consequently the courts in many states, whatever may have been their course toward other private corporations, have recognized the public character of bank charters, amendments, renewals and other changes.⁹ To the public

⁸ Seeberger v. McCormick, 178 Ill., affg. 73 Ill. App. 87.

⁹ Commercial Bank v. Newport Mfg. Co., 1 B. Mon. (Ky.) 13; Roberts v. State, 9 Porter (Ala.) 312, 317; Crawford v. Planters' & Merch. Bank, 6 Ala. 289; Crawford v. Branch Bank, 7 Ala. 383; Jemison v. Planters' & Merch. Bank, 17 Ala. 754; Bank v. Wollaston, 3 Har. (Del.) 90; Davis v. Bank, 31 Ga. 69; Terry v. Merchants & Planters' Bank, 66 Ga. 177; Vance v. Farmers' & Mech. Bank, 1 Blackf. (Ind.) 80; Gordon v. Montgomery, 19 Ind. 110; In re Rogers, 2 Me. 303; Agnew v. Bank, 2 Har. & Gill (Md.) 478; Towson v. Havre-de-Grace Bank, 6 Har. & J. (Md.) 47; Jones v. Fales, 4 Mass. 245, 252; Bank v. Smedes, 3 Cow. (N. Y.) 662, 694; Hoyt v. Thompson, 19 N. Y. 207; Bank v. Greenville R., 9 Rich.

character thus accorded to banks, the courts of Pennsylvania and Louisiana are the most noteworthy exceptions.¹⁰

22. Pleading of Existence.

An action brought by a bank in its corporate name is an implied averment of corporate existence, and is sufficient unless a plea of abatement is interposed.¹¹ It is customary, however,

Law (S. C.) 495; *Williams v. Union Bank*, 2 Humph. (Tenn.) 339; *Buell v. Warner*, 33 Vt. 570, 578; *Stribbling v. Bank*, 5 Rand. (Va.) 132; *Hays v. Northwestern Bank*, 9 Gratt. (Va.) 127; *Bohmer v. City Bank*, 77 Va. 445; *Northwestern Bank v. Machir*, 18 W. Va. 271; *Young v. Bank*, 4 Cranch (U. S.) 384, 388. In some states all legislation by common statute is public. *Durham v. Daniels*, 2 Greene (Iowa) 518; *Chapman v. Colby*, 47 Mich. 46; *State v. McAllister*, 24 Me. 139.

¹⁰ *First Nat. Bank v. Gruber*, 87 Pa. 468; *Manderé v. Bonsignore*, 28 La. Ann. 415; *Workingmen's Bank v. Converse*, 33 La. Ann. 963.

¹¹ *Ryan v. Farmers' Bank*, 5 Kan. 658; *Parker v. Carolina Sav. Bank*, 53 S. C. 583; *Rees v. Conocoheague Bank*, 5 Rand. (Va.) 326; *Phoenix Bank v. Curtis*, 14 Conn. 437; *Sayers v. First Nat. Bank*, 89 Ind. 230; *Smythe v. Scott*, 124 Ind. 183; *Shearer v. Peale & Co.*, 9 Ind. App. 282; *Exchange Nat. Bank v. Capps*, 32 Neb. 242; *Loan & Trust Sav. Bank v. Stoddard*, 2 Neb. (Unof.) 486; *Mix v. National Bank*, 91 Ill. 20; *Frye v. Bank of Illinois*, 10 Ill. 332; *Holden v. Great Western Elevator Co.*, 69 Minn. 527; *Lewis v. Bank*, 12 Ohio 132, 146; *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. (Ky.) 13; *Central Bank v. Knowlton*, 12 Wis. 624; *Columbia Bank v. Jackson*, 4 N. Y. Supp. 433; *Bank of U. S. v. Haskins*, 1 Johns. Cas. (N. Y.) 132; *Gill v. First Nat. Bank*, 47 S. W. (Tex. Civ. App.) 751; *Phoenix Bank v. Donnell*, 40 N. Y. 410; *Bank v. Beltser*, 13 How. Pr. (N. Y.) 270; *Hallett v. Harrower*, 33 Barb. (N. Y.) 537; *Union Cement Co. v. Noble*, 15 Fed. 502, containing a good decision of the question. See note 35 Am. St. Rep. 291, also cases in §23 note 5. A denial that the plaintiff is a corporation duly organized under a specific law does "not traverse the corporate existence of the relator, but only the regularity of the proceedings by which it was incorporated." *First Nat. Bank v. Gibson*, 60 Neb. 767; *State v. Cass Co. Board*, 53 Neb. 767. An averment that the plaintiff is a national bank, doing business under the act of Congress, is sufficient. *Joseph Holmes Fuel Co. v. Commercial Nat. Bank*, 23 Col. 210; *Gill v. First Nat. Bank*, 47 S. W. (Tex. Civ. App.) 751. A bill brought in the name of A. B. in his capacity as president of the N. O. Nat. Bank, that is regarded by the parties as the suit of the bank in all the lower proceedings, will not be regarded differently by the final court of appeal. *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439. An action brought in the name of A. B., Cashier of S. Bank, is an individual action, and the phrase, Cashier, is mere surplusage. *Porter v. Neckervis*, 4 Rand. (Va.) 359.

to allege that the bank has been incorporated.¹² In like manner, to sue a bank as a corporation, is an admission by the plaintiff that it has a legal existence, which he cannot afterward question.¹³ And a similar admission is made by pleading the general issue.¹⁴

23. Proof of Existence.

The existence of a bank may be proved by reputation.¹⁵ Proof that it has a name, an office and officers, is doing business and preserves a record thereof, issues and circulates its notes, is competent to show that the bank is existing.¹⁶ Be-

12 2 Cook on Corp. §753. The complaint should also state whether the bank is a foreign or a domestic one. N. Y. Code, Sec. 1775; *Farmers' & Merch. Nat. Bank v. Rogers*, N. Y. 15 Civil Proc. Rep. (N. Y.) 250.

13 *First Nat. Bank v. Dovetail Gear Co.*, 143 Ind. 534; *Nebraska Nat. Bank v. Ferguson*, 49 Neb. 109; *Lester v. Georgia R.*, 90 Ga. 802; *Ward v. Minn. & Northwestern R.*, 119 Ill. 287.

14 *Prince v. Commercial Bank*, 1 Ala. 241; *Phenix Bank v. Curtis*, 14 Conn. 437; *Bank v. Weed*, 19 Johns. (N. Y.) 300; *Commercial Bank v. Pfeiffer*, 108 N. Y. 242, 252; *Farmers' & Mech. Bank v. Rayner*, 2 Hall (N. Y.) Super. Ct. 195; *Bailey v. Valley Nat. Bank*, 127 Ill. 332; *Rembert v. Railway Co.*, 31 S. C. 309; *Heaston v. Cin. & Ft. Wayne R.*, 16 Ind. 275; *Chamberlain Bkg. House v. Kemper*, 3 Neb. (Unof.) 549; *Pullman v. Upton*, 96 U. S. 328; *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 386, 450; *Society v. Town of Pawlet*, 4 Pet. (U. S.) 480, 501. In Wis. if the corporate existence is to be questioned there must be a specific denial of it in the answer to the complaint. Code, Secs. 2655, 4195; *Michigan Ins. Co. v. Eldred*, 143 U. S. 293.

15 *State v. Helmes*, 3 N. J. Law, 764, 769 (2d Ed.); *Jennings v. People*, 8 Mich. 81; *Sasser v. State*, 13 Ohio 453, 486; *Reed v. State*, 15 Ohio 217; *Narragansett Bank v. Atlantic Silk Co.*, 3 Met. (Mass.) 282, 288; *Johnson v. People*, 4 Denio (N. Y.) 364; *People v. Caryl*, 12 Wend. (N. Y.) 547; *People v. Davis*, 21 Wend. 309; *People v. Chadwick*, 2 Park, Crim. (N. Y.) 163.

16 *Way v. Butterworth*, 106 Mass. 75; *Farmers' & Mech. Bank v. Jenks*, 7 Met. (Mass.) 592; *Farmers & Drovers' Bank v. Williamson*, 61 Mo. 259; *State v. Carr*, 5 N. H. 367; *Leonardsville Bank v. Willard*, 25 N. Y. 574; *Dennis v. People*, 1 Parker Crim. 469; *People v. Chadwick*, 2 Parker Crim. 163; *Bank v. Allen*, 11 Vt. 302; *Lucas v. Bank*, 2 Stew. (Ala.) 147; *First Nat. Bank v. Randall*, 1 Tex. Ct. of App. §972. See *Pape v. Capitol Bank*, 20 Kan. 440, 444. When a bank's corporate existence is put in issue it is sufficient to show the charter and parol evidence that it is transacting business. *Bank v. Allen*, 11 Vt. 302.

sides proving its existence by action, the charter itself, or a certified copy is the common proof.¹⁷ The existence of a national bank is proved by the controller's certificate and the continued operation of the association.¹⁸

In an action between a bank and individuals for the enforcement of a contract made with the institution, its legal existence is conclusively presumed.¹⁹ No individual can make a collateral attack thereon; only the state, in a direct action.²⁰ And even in a criminal action against a bank officer, he cannot successfully interpose the bank's legally defective existence as a defence, if, in truth, it had actually existed.²¹

17 *Gaines v. Bank*, 12 Ark. 769; *Agnew v. Bank*, 2 Har. & Gill (Md.) 478; *Henderson v. Miss. Union Bank*, 6 Sm. & M. (Miss.) 314; *People v. Peabody*, 25 Wend. (N. Y.) 472; *Farmers & Mech. Bank v. Jenks*, 7 Met. (Mass.) 592; *Bank v. Allen*, 11 Vt. 302; *Merchants' Bank v. Harrison*, 39 Mo. 433.

18 *Mix v. National Bank*, 91 Ill. 20; *Thatcher v. West River Nat. Bank*, 19 Mich. 196; *Citizens Nat. Bank v. Great Western Elevator Co.*, 13 S. Dak. 1; *Hanover Nat. Bank v. Johnson*, 90 Ala. 549; *National Bank v. Galland*, 14 Wash. 502; *First Nat. Bank v. Kidd*, 20 Minn. 234; *Tapley v. Martin*, 116 Mass. 275; *Tyler v. United States*, 106 Fed. 137; *Casey v. Galli*, 94 U. S. 673.

19 *Farmers & Millers' Bank v. Detroit R.*, 17 Wis. 372, 377; *Narragansett Bank v. Atlantic Silk Co.*, 3 Met. (Mass.) 282; *West Winsted Sav. Bank v. Ford*, 27 Conn. 282; *Plummer v. Struby-Estabrooke Co.*, 23 Colo. 190; *Joseph Holmes Fuel Co. v. Commercial Nat. Bank*, 23 Colo. 210; *Jones v. Bank*, 8 B. Mon. (Ky.) 122; *Bank v. Trimble*, 6 B. Mon. 599; *Depew v. Bank*, 1 J. J. Marsh. (Ky.) 378; *Huffaker v. National Bank*, 12 Bush (Ky.) 287; *Williams v. Union Bank*, 2 Humph. (Tenn.) 339; *Camp v. Land*, 122 Cal. 167; *Spahr v. Farmers' Bank*, 94 Pa. 429; *Slaughter v. First Nat. Bank*, 109 Ala. 157; *Planters & Miners' Bank v. Padgett*, 69 Ga. 159. An incorporator who has dealings with the bank is estopped to deny its corporate existence. *Curtis Parker*, 136 Ala. 217.

20 *Armour v. E. Bement's Sons*, 123 Fed. 56; *Camp v. Land*, 122 Cal. 167; *Exchange Nat. Bank v. Capps*, 32 Neb. 242; *Platte Valley Bank v. Harding*, 1 Neb. 461; *Irvine v. Lumbermen's Bank*, 2 W. & S. (Pa.) 190; *Williams v. Union Bank*, 2 Humph. (Tenn.) 339. A note made payable at the plaintiff's bank is not conclusive evidence of its existence in an action against the maker. *Hungerford Nat. Bank v. Van Nostrand*, 106 Mass. 559. See §15.

21 *State v. Mason*, 61 Kan. 102; *State v. Stevens*, 16 S. Dak. 309.

24. Pleading and Proof of Foreign Bank.

The charter of a foreign bank must be pleaded and proved like any other foreign law; the plea of the general issue does not admit its existence.²² This is the ancient rule; but a person who has contracted with a corporation, real or assumed, and received a benefit therefrom, cannot defend himself under the general issue by attacking its legal existence. This principle may be invoked by a foreign bank that is seeking to recover on a note or other obligation; it may therefore plead very much like a home corporation.²³

In the federal courts, only one rule is applied to both foreign and domestic corporations. In these tribunals, the existence of either kind of corporation can be denied only by a special plea in abatement or bar, or notice.²⁴

25. General Authority.

The principal object of banking is to collect a fund for lending to persons engaged in mercantile and other lawful pursuits; likewise to receive and lend deposits, so far as the law will permit. Incidentally to receiving deposits is the collection of checks and other instruments credited to depositors. The authority to do these things can best be considered in treating

²² *Johnson v. Hanover Nat. Bank*, 88 Ala. 271; *Savage v. Russell*, 84 Ala. 103; *United States Bank v. Stearns*, 15 Wend. (N. Y.) 314; *Bank v. Williams*, 5 Wend. 478; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *School District v. Blaisdell*, 6 N. H. 197. See *Lewis v. Bank*, 12 Ohio 132, 146. Having proved its grant of power, a foreign bank may prove the execution of a note to the institution. *Gaines v. Bank*, 12 Ark. 769. In Conn. in an action brought on a contract the plea of the general issue admits the capacity of the foreign branch to sue, but does not admit the authority of the bank to make the contract; such authority must therefore be proved in order to recover. *Phenix Bank v. Curtis*, 14 Conn. 437, reviewing many cases.

²³ *Commercial Bank v. Pfeiffer*, 108 N. Y. 242. In Tennessee, in an action at law, if the plaintiff is alleged to be a corporation, even though foreign, the fact need not be proved unless it is put in issue by a specific denial, but a different rule applies in equity. *Bank v. Jefferson*, 92 Tenn. 537.

²⁴ *Union Cement Co. v. Noble*, 15 Fed. 502; *Conard v. Atlantic Mo. Co.*, 1 Pet. (U. S.) 386, 450; *Society v. Town of Pawlet*, 4 Pet. 480, 501.

of loans and deposits;²⁵ other things that are done by banks will be described in this place.

(a). The first question is a bank's authority to deal in stocks and bonds. In one sense this is a mode of lending or investing, either temporarily or permanently, a bank's resources. A national bank can deal only in national securities,²⁶ but if it should transcend its authority, the federal government has sole power to punish the offender.²⁷

Some of the states endow their banks with authority to buy, sell, and exchange bonds and stocks,²⁸ while other states withhold from them this authority.²⁹ Many of the trust companies have a still wider latitude. Indeed, one reason for establishing them is because the powers of the banks are in several directions circumscribed.

25 Chaps. VI. and VII.

26 *Yerkes v. National Bank*, 69 N. Y. 382; *Van Leuven v. First Nat. Bank*, 54 N. Y. 671; *Franklin Sav. Bank v. Colby*, 105 Iowa 424; *Leach v. Hale*, 31 Iowa 69; *First Nat. Bank v. Hoch*, 89 Pa. 324, 327; *Fowler v. Scully*, 72 Pa. 456; *Weckler v. First Nat. Bank*, 42 Md. 581; *Logan Co. Nat. Bank v. Townsend*, 8 Ky. L. Rep. 694, *affd.* 139 U. S. 67; *Grow v. Cockrill*, 63 Ark. 418; *Dresser v. Traders' Nat. Bank*, 165 Mass. 120; *Farmers' & Merch. Nat. Bank v. Smith*, 23 C. C. A. 80; *First Nat. Bank v. Nat. Ex. Bank*, 92 U. S. 122; *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364; *California Bank v. Kennedy*, 167 U. S. 362. In Kentucky the highest court has decided that a national bank can purchase other bonds. *Newport Nat. Bank v. Board of Education*, 114 Ky. 87. This decision is clearly wrong. The chief function of a national bank is to lend on mercantile paper. An exception is made in favor of the purchase of national bonds, because the banks are an agency of the government, and the purchase and sale of its securities may be helpful to it. A national bank cannot act as a bond broker. *Smith v. Phila. Nat. Bank*, 34 Leg. Int. (Pa.) 86.

27 *Town of Lexington v. Union Nat. Bank*, 75 Miss. 1, 12.

28 See *Goddin v. Crump*, 8 Leigh (Va.) 120; *Mt. Vernon Bank v. Porter*, 52 Mo. App. 244; *Aull Sav. Bank v. City of Lexington*, 74 Mo. 104; *International Bank v. Franklin Co.*, 65 Mo. 105.

29 *Mechanics Sav. Bank v. Meriden Agency Co.*, 24 Conn. 159; *Hill v. Nisbet*, 100 Ind. 341, 349; *Franklin Co. v. Lewiston Institution for Savings*, 68 Me. 43; *Bank v. Hart*, 37 Neb. 197; *Nassau Bank v. Jones*, 95 N. Y. 115; *Talmage v. Pell*, 7 N. Y. 328; *Berry v. Yates*, 24 Barb. (N. Y.) 199, 210; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350; *Central R. Co. v. Collins*, 40 Ga. 582. See Chap. VII. §§5, 6.

(b). A national bank can permanently hold only enough real estate for its business purposes.³⁰ But the courts have not narrowly construed the law, either state or national, to mean its banking office. It may erect a large building if this be the most desirable and economical method of obtaining the room desired for itself.³¹ And if a lease, however long the term, be a more advantageous method of holding than an absolute purchase, it can be taken, though the term exceed the period of the bank's charter.³²

The national bank regulations on this subject are founded largely on state experience. By a few states banks have been permitted by statutory or chartered authority to make loans secured contemporaneously on real estate;³³ by the larger number, this power to lend has been denied,³⁴ as well as the authority to acquire and hold real estate in trust;³⁵ or to purchase with the view to sell again at a profit.³⁶ A bank may indeed purchase land with the intention of erecting an office thereon,³⁷ and a broad construction is placed on its authority to buy and build for its own use.³⁸

30 Rev. Stat. §5137. The authority of a national bank to buy or hold real estate can be raised by the federal government only. *Minn. Threshing Machine Co. v. Jones*, 95 Minn. 127; *Hennessy v. St. Paul*, 54 Minn. 219.

31 *Brown v. Schleier*, 55 C. C. A. 475; *Farmers' Deposit Nat. Bank v. Western Pa. Fuel Co.*, 215 Pa. 115.

32 *Brown case*, 55 C. C. A. 475; *Weeks v. International Trust Co.*, 60 C. C. A. 236.

33 *Thomaston Bank v. Stimpson*, 21 Me. 195; *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 343.

34 *Bank v. Niles*, 1 Doug. (Mich.) 401; *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *Lathrop v. Commercial Bank*, 8 Dana (Ky.) 114, 119; *Thweatt v. Bank*, 81 Ky. 1; *State Bank v. Breckenridge*, 7 Blackf. (Ind.) 395; *State Bank v. Coquillard*, 6 Ind. 232. Savings banks have more authority. See Chap. VII. §14.

35 *Hall v. Farmers' & Merch. Bank*, 145 Mo. 418; *Camp v. Land*, 122 Cal. 167. The deed, if taken, would be valid against strangers. *Ibid.*

36 *Bank v. Niles*, 1 Doug. (Mich.) 401.

37 *Bank v. Niles*, 1 Doug. (Mich.) 401; *Thweatt v. Bank*, 81 Ky. 1; *Leggett v. N. J. Manuf. & Bkg. Co.*, 1 N. J. Eq. 541; *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 343.

38 *Banks v. Poitiaux*, 3 Rand. (Va.) 136. But see *Thweatt v. Bank*, 81 Ky. 1, 7.

Should a bank violate its charter in this particular, which is regarded simply as directory and imposing no penalty, the deed taken by the bank would not be void, while it in turn could execute a valid conveyance thereof to another. The state only can recognize and punish the offender. So declared the Court of Appeals of Virginia, three-quarters of a century ago.³⁹

While therefore authority is generally denied state banks to hold real estate, save under the restrictions above mentioned, they can purchase at an execution sale in their own favor, or take land as security for a past debt, to escape a real or apprehended loss.⁴⁰ Indeed, it is the clear duty of a bank to use the utmost vigilance to protect itself from incurring loss to the obvious benefit of its members. And the possession of such authority clearly includes authority to sell and convey the property thus acquired.⁴¹

(c). A corporate bank cannot create a subordinate corporation. If therefore a bank creates a branch the relationship between the two is that of principal and agent; all the assets of the agency belong to the principal, which in turn is responsible for the other's debts. Consequently on the failure of the principal, all creditors of both share equably and rateably.⁴²

(d). Other authority possessed by a bank may be briefly described. It may act by the agreement of two parties as their

39 Ibid. (1825); *Hennessy v. City of St. Paul*, 54 Minn. 219; *Minneapolis Threshing Mach. Co. v. Jones*, 95 Minn. 127.

40 *Magruder v. State Bank*, 18 Ark. 9; *Farmers & Millers' Bank v. Detroit R.*, 17 Wis. 372; *Chautauqua Co. Bank v. Risley*, 19 N. Y. 369; *Baird v. Bank*, 11 Serg. & R. (Pa.) 411; *Merchants' Bank v. Harrison*, 39 Mo. 433; *Ingraham v. Speed*, 30 Miss. 410; *Martin v. Branch Bank*, 15 Ala. 587; *Sparks v. State Bank*, 7 Blackf. (Ind.) 469, 471; *Sherry v. Denn*, 8 Blackf. 542; *Bank v. Niles*, 1 Doug. (Mich.) 401; *Trenton Bkg. Co. v. Woodruff*, 1 Gr. Ch. (N. J.) 117.

Contra.—*Williams v. McKay*, 46 N. J. Eq. 25.

41 *Jackson v. Brown*, 5 Wend. (N. Y.) 590.

42 *Worth v. Bank*, 122 N. C. 397; *Prince v. Oriental Bank*, L. R. 3 App. Cas. 325; *Garnet v. M'Kewan*, L. R. 8 Ex. 10; *Irwin v. Bank*, 38 U. C. Q. B. 375.

mutual agent;⁴³ employ counsel without a formal vote of the directors;⁴⁴ deposit money in another bank,⁴⁵ and transfer thereto the money of a depositor.⁴⁶ It may collect and remit money due on a lease;⁴⁷ issue certificates of deposit payable on demand, or in the future;⁴⁸ become a party to a fraudulent conspiracy, like a natural person, attended with similar responsibility;⁴⁹ and maintain an action of libel against an assailant of its good name.⁵⁰ Though required to have a seal, a corporate bank may dispense with its use in all cases in which this can be done by an individual,⁵¹ including the appointment of any agent, whatever may be the purpose of the agency.⁵²

43 *Gregg v. Bi-Metallic Bank*, 14 Colo. App. 251. A bank carried a person for the money he used in buying and shipping stock. The returns of the sales were made to the bank and the proceeds were credited to the shipper. The bank was regarded as the shipper's agent, and consequently did not, in thus acting, violate the statutory prohibition against trading and buying and selling chattels. *Griffin v. Wabash R. Co.*, 91 S. W. (Mo.) 1015.

44 *Lowe v. Ring*, 115 Wis. 575, 581; *Manchester Bank v. Fellows*, 28 N. H. 302, 307; *St. Louis R. v. Grove*, 39 Kan. 731; *McCabe v. Fountain Co.*, 46 Ind. 380.

45 *State Sav. Bank v. Foster*, 118 Mich. 268, 271; *Elmira Sav. Bank v. Davis*, 73 Hun (N. Y.) 357.

46 *Bank v. Howell*, 79 Mo. App. 318.

47 *Knapp v. Saunders*, 15 S. Dak. 464. The presumption is that the cashier in receiving money thus due and depositing it subject to his check is acting officially, and not individually. *Ibid.*

48 *State v. Shove*, 96 Wis. 1, 6; *Burnell v. San Francisco Sav. Union*, 136 Cal. 499.

49 *Wright v. Stewart*, 130 Fed. 905.

50 *Knickerbocker Life Ins. Co. v. Ecclesine*, 34 N. Y. Super. Ct. 76; *Shoe & Leather Bank v. Thompson*, 18 Abb. Pr. (N. Y.) 413; *Martin Co. Bank v. Day*, 73 Minn. 195.

51 *Bank of Columbia v. Patterson*, 7 Cranch (U. S.) 299; *Fleckner v. Bank*, 8 Wheat. (U. S.) 338; *Bank v. Dandridge*, 12 Wheat. 64.

52 *Fleckner v. Bank*, 8 Wheat. (U. S.) 357; *Osborn v. Bank*, 9 Wheat. 738; *Bank v. Dandridge*, 12 Wheat. 64; *Western Bank v. Gilstrap*, 45 Mo. 419; *Mumford v. Hawkins*, 5 Denio (N. Y.) 355; *Lathrop v. Commercial Bank*, 8 Dana (Ky.) 114; *Everett v. United States*, 6 Port. (Ala.) 166; *Bates v. Bank of Alabama*, 2 Ala. 451, 461; *Savings Bank v. Davis*, 8 Conn. 191; *Badger v. Bank of Cumberland*, 26 Me. 428.

(e). It hardly need be added that a corporate bank, either state⁵³ or national,⁵⁴ cannot become a member of a partnership; yet if it does, a state, but not a national bank must account to the other partners who have fully performed their obligations.⁵⁵

(f). Banks that are closing business may move in a wider circle, as such a course may be for the manifest interest of all the parties.⁵⁶

26. General Authority Within the State.

Usually a bank is not restricted in its activity to any specific part of the creating state. In a few cases they have been restricted to counties.⁵⁷ One of the most important questions has related to their power to deal in exchange.⁵⁸ If possessing unrestricted authority to deal in bills, they can purchase them at other places.⁵⁹ A national bank, though having the country for its field of operations, must be definitely located in a state where its office is located, and where the majority of its officers live.⁶⁰

27. Authority Outside the State.

While authority to engage in corporate banking must be

53 *Merchants' Nat. Bank v. Standard Wagon Co.*, 65 Ohio St. 559; *Geurinck v. Alcott*, 66 Ohio St. 94; *Boyd v. American Carbon-Black Co.*, 182 Pa. 206.

54 *Merchants' Nat. Bank v. Wehrmann*, 69 Ohio St. 160.

55 *Boyd v. American Carbon-Black Co.*, 182 Pa. 206, and cases cited; *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, revg. 69 Ohio St. 160.

56 Thus in Pennsylvania, though banks were prohibited by statute from trading in bonds and judgments, this did not prevent a bank when closing its business, from taking an assignment of a judgment in part-payment of its banking-house. *Harwood v. Ramsey*, 15 Serg. & R. (Pa.) 31.

57 *City Bank v. Beach*, 1 Blatch. (U. S.) 425; *People v. Oakland Co. Bank*, 1 Doug. (Mich.) 282. See *People v. National Sav. Bank*, 129 Ill. 618. If the operations of a bank are restricted in New York to a village, it may discount a note in the principal city of the state. *Potter v. Bank*, 7 Hill (N. Y.) 530.

58 *Ibid.*

59 *City Bank v. Beach*, 1 Blatch. (U. S.) 425.

60 *Rev. Stat. §5190*. A national bank is not situated in a place within a state where no business is transacted except that of receiving deposits. *National State Bank v. Pierce*, 5 Pa. Week. Notes 344. See Note 64.

confined to the domain of the granting power,⁶¹ by comity banking corporations are permitted to do many things beyond their own state.⁶² As they exist in every state, the courts have given a wide application to the principle of comity, limiting its application by such restrictions as are applied to similar institutions at home, or by such other restrictions as prudence and public welfare demand.

Having authority to exclude them, it follows that a state can prescribe on what terms they may enter and transact business.⁶³ It may therefore require a bank to maintain an office within its jurisdiction for the transaction of business and the transfer of stock bought and held by its own citizens.⁶⁴ Nor can a bank in another state do anything that would be unlawful if done at home.⁶⁵

A foreign bank must conform to the laws of the state wherein it is doing business.⁶⁶ Nor is the making of an occasional loan and taking security with no intention of violating any law prohibiting such action an abuse of the principle.⁶⁷ The loan,

61 *Lane v. Bank*, 9 Heisk. (Tenn.) 419; *Bank v. Stegall*, 41 Miss. 142. As a state has no right to charter a bank with power to establish banking companies in another state, such a bank in a foreign state is regarded as unchartered. *Atterberry v. Knox*, 4 B. Mon. (Ky.) 90.

62 *Pickaway Co. Bank v. Prather*, 12 Ohio St. 497, 502.

63 *Milwaukee Trust Co. v. Germania Ins. Co.*, 106 La. 669; *St. Clair v. Cox*, 106 U. S. 350.

64 *London Bank v. Aronstein*, 54 C. C. A. 663.

65 See note and cases cited in *Metropolitan Bank v. Godfrey*, 23 Ill. 579, 609.

66 *In re Comstock*, 3 Saw. (U. S.) 218; *Commercial Bank v. Sherman*, 28 Or. 573.

67 *Suydam v. Morris Canal & Bkg. Co.*, 6 Hill (N. Y.) 217; *Commercial Bank v. Sherman*, 28 Or. 573; *Kennedy v. Knight*, 21 Wis. 340; *Pickaway Co. Bank v. Prather*, 12 Ohio St. 497; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322. See *Rezner v. Hatch*, 2 Handy, (Ohio) 42. A mortgage that is void because executed by virtue of a resolution adopted at a meeting in a foreign state that could not be legally held, cannot be ratified at another meeting held within the state and prevail over an attachment levied before the ratification. A different rule would be applied had the ratification occurred first. *Union Nat. Bank v. State Nat. Bank*, 155 Mo. 95.

therefore, if not paid, may be enforced.⁶⁸ But the establishing of a banking office or agency to receive deposits and make loans is opposed, both by court and legislature.⁶⁹ With few exceptions, the courts are as widely open to foreign banks as to any others.⁷⁰

A foreign non-banking corporation can make loans in another state, for in so doing it is not a serious competitor as a lender with the banks in that state.⁷¹ Vice versa, a foreign bank can sue on a transaction not of a banking nature.⁷²

A national bank may have an office for receiving deposits in another state,⁷³ unless restricted by statute.⁷⁴ Nor can a state prescribe what officers a national bank must have before undertaking to transact business within its limits.⁷⁵

68 *Kennedy v. Knight*, 21 Wis. 340, 346. The bringing of an action on a note by a foreign bank is not a violation of the law prohibiting foreign banks from transacting business in New York without complying with its provisions. *Citizens State Bank v. Cowles*, 89 N. Y. App. Div. 281.

69 *Bank v. Pindall*, 2 Rand. (Va.) 465, 474; *Bank v. Stegall*, 41 Miss. 142; *Taylor v. Bruen*, 2 Barb. Ch. (N. Y.) 301; *Bowman v. Cecil Bank*, 3 Grant's Cases (Pa.) 33. In New York by statute a foreign bank or trust company cannot have a foreign office of deposit and discount in that state, (1 Rev. Stat. 708, §§6, 7, 2d Ed.) and if notes are discounted, it cannot recover on them. *National Bank v. Phoenix Warehousing Co.*, 6 Hun 71; *DeGroot v. Van Duzer*, 20 Wend. 390; *New Hope Co. v. Poughkeepsie Silk Co.*, 25 Wend. 648. See *Pennington v. Townsend*, 7 Wend. 276.

70 *Lewis v. Bank*, 12 Ohio 132.

71 *Conn. Mutual Life Ins. Co. v. Albert*, 39 Mo. 181.

72 *Freeman v. Bank*, 3 Wilson Civ. App. Cas. (Tex.) §338, p. 406.

73 *National State Bank v. Pierce*, 5 Pa. Week. Notes, 344. A national bank cannot cash checks at any other place than at its office or banking house. *Armstrong v. Second Nat. Bank*, 38 Fed. 883.

74 *National Bank v. Phoenix Warehousing Co.*, 6 Hun (N. Y.) 71.

75 *Armstrong v. Second Nat. Bank*, 38 Fed. 883; *First Nat. Bank v. Commonwealth*, 17 Ky. L. Rep. 1167.

CHAPTER II.

REORGANIZATION, SUPERVISION AND REPORTS.

- | | |
|--|--|
| <ol style="list-style-type: none">1. Liability of former bank to debtors and stockholders.<ol style="list-style-type: none">a. Of corporate bank.b. Of private bank.c. Distinction between new and reorganized bank.d. Particular reorganization.2. Reorganization of insolvent bank.3. Liability of consolidated bank.4. Renewal or extension of charter. | <ol style="list-style-type: none">5. Conversion of state into national bank.6. State supervision.7. National supervision.8. Banks must make reports.9. Official and judicial construction of reports.10. Consequences of not making them within the required period.11. False and erroneous reports. |
|--|--|

1. Liability of Former Bank to Debtors and Stockholders.

(a). Occasionally a bank is reorganized, which is still liable for the debts of the former bank if essentially the same institution.¹ In like manner the maker, endorser, or guarantor of an instrument owned by the former institution cannot dispute

¹ See Chap. V. §14c; *Ray v. Bank*, 10 Bush (Ky.) 344; *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412; *Reed Brothers Co. v. First Nat. Bank*, 46 Neb. 168; *Commercial Bank v. Tulbert*, 103 Mich. 625; *Hicks v. Steel*, 105 N. W. (Mich.) 767; *City Nat. Bank v. Phelps*, 97 N. Y. 44; *Willius v. Mann*, 91 Minn. 494; *Ean v. Exchange Bank*, 79 Mo. 182; *Thompson v. Board of Education*, 61 Mo. 176; *Hughes v. School District*, 72 Mo. 643; *Hopper v. Moore*, 42 Iowa 563; *Mitchell v. Beckman*, 64 Cal. 117; *Starr v. Stiles*, 2 Arizona 436. See *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398. A bank that seeks to change its business into some other kind cannot thereby avoid any of its liabilities. And if a diversion of its assets is attempted before the bank's creditors are paid, this may be prevented by an injunction. *City of New Orleans v. Commercial Bank*, 3 La. Ann. 96. For the debts contracted between the passage of an act providing for the revival of the bank and its acceptance, the new bank is liable. *City Bank v. Barbrin*, 6 Rob. (La.) 289.

his liability to the new one.² But a new corporation with different stockholders cannot be sued by the creditors of the old corporation, unless its assets have been taken by the new corporation without giving for them adequate value.³ To justify proceedings by the creditors of the old concern against its successor, it must appear from the pleadings and proof that the transformation was a fraud, or that the new concern is continuing essentially the business and retaining the property of the other.⁴ But the creditors of the old corporation can follow the assets into the possession of its successor.⁵

The stockholders of a bank may determine to go into voluntary liquidation, and afterward to reorganize. Should one of the number decline to join and accept his dividends from the assets of the old bank, he could not at a later period, after the success of the new enterprise was assured, thrust himself by judicial aid among his former associates.⁶ Courts are not established to do such things.

(b). The same rule applies to a private bank. Therefore, a bank that transfers accounts from another and leads depositors to believe they have been transferred, is estopped from denying its liability for them.⁷ And if depositors receive a

2 Spahr v. Farmers' Bank, 94 Pa. 429, 434; First Com. Bank v. Talbert, 103 Mich. 625; Clifford Bkg. Co. v. Donovan Commission Co., 195 Mo. 262; Campbell v. Perth Amboy Shipbuilding Co., 62 At. (N. J. Eq.) 319.

3 Donnally v. Hearndon, 41 W. Va. 519.

4 Austin v. Tecumseh Nat. Bank, 49 Neb. 412.

5 Ewing v. Composite Brake Shoe Co., 169 Mass. 72.

6 First Nat. Bank v. Marshall, 26 Mo. App. 440. See note in Chap. XXI. §8.

7 Nicholson v. Randall Bkg. Co., 130 Cal. 533; Johnson v. Shuey, 82 Pac. (Wash.) 123; La Montagne v. Bank of New York Nat. Bkg. Association, 183 N. Y. 173, modifying 94 App. Div. 219. A partner authorized another to endorse renewal notes with the partnership name, which was known by the bank that discounted them. This authority was construed not as limiting his action to the first renewals, but as extending to other notes given to the bank after its reorganization. First Com. Bank v. Talbert, 103 Mich. 625. A and B, who were conducting a private bank, organized a corporation retaining control of the stock. The assets were turned over to the new corporation and notes were taken from some of the stockholders for their stock. They were held liable for the unpaid portion,

portion of their deposits from the purchaser or his assignee, the original banker or vendor is still liable for the remainder whatever may have been his agreement with the purchaser.⁸

(c). A bank whose existence has expired by limitation, unless legally prolonged, is dead; and a new one organized with the same name and directors, and doing business in the same office is in all regards a new corporation and not responsible for the indebtedness of the other, save by statute.⁹ Again, the officers of a corporation, whose entire property is sold to a new corporation with the same officers, have no longer any authority to contract indebtedness for the old organization.¹⁰

(d). Various questions have arisen in executing reorganization arrangements; most of them have been constructions of particular agreements, and have little, or no application to other cases.¹¹

and for an amount equal to the par value for the liabilities of the bank. *Porter v. Sherman Co. Bkg. Co.*, 36 Neb. 271. A banking partnership transferred its assets to an incorporated bank, of which two of the members became president and cashier. The partnership guaranteed all bad and doubtful paper. It was liable on renewals. *Leonhardt v. Citizens Bank*, 56 Neb. 38. A firm of brokers transferred their business and assets to a new firm. The check of a special partner was endorsed for deposit by a common member of both firms in the name of the new firm and deposited to its credit the day before the filing of the partnership statement. A check was drawn on the deposit by a member of the new firm and applied on an overdraft of the old one. This was not a misappropriation of the assets of the new firm. *La Montagne v. Bank of N. Y. Nat. Bkg. Assn.*, 183 N. Y. 173, modfg. 94 App. Div. 219.

8 *Johnson v. Shuey*, 82 Pac. (Wash.) 123.

9 *Bellows v. Hollowell & Augusta Bank*, 2 Mason (U. S.) 31; *Wyman v. Hollowell & Augusta Bank*, 14 Mass. 58, 62; *Ray v. Bank*, 10 Bush. (Ky.) 344; *City Bank v. Barbarin*, 6 Rob. (La.) 289.

10 *Union Bank v. Wando Mining & Mfg. Co.*, 17 S. C. 339.

11 *Dallemand v. Odd Fellows Sav. Bank*, 74 Cal. 598; *De Sellem v. Iowa City Bank*, 101 Iowa 566; *Hunt v. Roosen*, 87 Minn. 68; *Willius v. Mann*, 91 Minn. 494; also Chap. V. §14c. A bank having a capital of \$25,000 and an indebtedness of nearly three-fifths of that amount and assets for only four-fifths of its capital, issued certificates of deposit for half of the amount of its capital to its stockholders and new certificates of stock for the other half, for the purpose of taking up all the older certificates. The bank having gone into liquidation, the receiver recovered the sums

2. Reorganization of Insolvent Bank.

What authority has a corporate bank to reorganize that has gone into insolvency? The doctrine is generally recognized that a bank has some power left, especially to sue and be sued; in other words, the power needful to collect its assets; on the other hand, it is liable to creditors for their just rights and demands. Does this remnant of existence include authority to reorganize? In Texas¹² it has been declared that a bank may, under a proper contract, transfer its assets to a new corporation, which may not be liable for the debts of the other. This rule, thus boldly expressed, is open to serious question. Can the rights of the creditors of the old bank be disregarded? Of course they have a right to pursue their claims against the old bank, but this would be a very dispiriting undertaking, knowing that its assets were gone and could not be recovered.

The court safely landed, as courts have on many other occasions of premature adventuring, holding that the stockholders of the new corporation by agreeing with the others to pay the debts of the old bank to a specified amount and to use its seal, thereby became liable for all its unpaid debts. Whether, if the agreement had been narrower, confined to taking the assets and devoting them entirely to the payment of the old bank's debts, deducting a proper sum for conducting the business, a different rule of liability would have followed, is worthy of consideration. One difficulty with the agreement actually made was, the assets might have exceeded in value the sum the new bank agreed to pay to the creditors of the other. Such an agreement is not lawful; by no agreement can creditors be deprived of their security without their consent.

paid on the certificates as they were without consideration. *State v. Bank of Ogallala*, 65 Neb. 20.

12 *Island City Sav. Bank v. Sachtleben*, 67 Tex. 420. An agreement for a composition by the creditors of an insolvent bank implying the cooperation of all will not justify any one of the number in making a settlement without the consent of all. *Abel v. Allemania Bank*, 79 Minn. 419. Nor will the subsequent signing of a reorganization scheme enlarge the authority of any creditor to act under the other. *Ibid*.

3. Liability of Consolidated Bank.

In consolidating banks the rights of all the members must be respected. The statute usually prescribes the terms of consolidation. Often the consent of every stockholder is necessary; and those who dissent cannot be compelled to act otherwise.¹³ Compulsory legislation would be invalid, clearly impairing the obligation of contracts. Consequently no stockholder can be compelled to join the new corporation and to receive stock therein on the surrender of his holdings in the old company.¹⁴ But, after obtaining the consent of all and determining the value of the stock of each bank, a stockholder in the absorbing bank is not entitled to any portion of the stock issued as an increase and for the purpose of paying for the stock of the other.¹⁵

Corporate banks, both state¹⁶ and national,¹⁷ may be consolidated, but, unless the authority be adequate, the consolidation is void.¹⁸ The effect of this act, when valid, is to dissolve the old corporations, and at the same instant to create a new one with property, liabilities, and stockholders derived from the others.¹⁹ Furthermore, a consolidation, and not a mere sale and purchase, is effected by the transfer of all the property,

13 *Black v. Del. Canal Co.*, 24 N. J. Eq. 455. *Gardner v. Hamilton Ins. Co.*, 33 N. Y. 421; *Davis v. Congregation Beth Tephila Israel*, 40 N. Y. App. Div. 424; *Kohl v. Lilienthal*, 81 Cal. 378.

14 *Clearweather v. Meredith*, 1 Wall (U. S.) 25, 39, 41; *Gardner v. Hamilton Ins. Co.*, 33 N. Y. 421.

15 *Bonnet v. First Nat. Bank*, 24 Tex. Civ. App. 613.

16 *Bonnet v. First Nat. Bank*, 24 Tex. Civ. App. 613, 617; *Overstreet v. Citizens' Bank*, 12 Okla. 383.

17 *Bonnet v. First Nat. Bank*, 24 Tex. Civ. App. 613, 617.

18 *Overstreet v. Citizens' Bank*, 12 Okla. 383; *Bonnet v. First Nat. Bank*, 24 Tex. Civ. App. 613; *McMahon v. Morrison*, 16 Ind. 172; *State v. Bailey*, 16 Ind. 46; *Boor v. Tolman*, 113 Ill. App. 322. Most of the questions relating to consolidation have arisen between railroad companies and have been well presented in two notes in 98 Am. St. Rep. 604-605, and 79 Am. Dec. 422-428.

19 *Bonnet v. First Nat. Bank*, 24 Tex. Civ. App. 613, 617; *Chicago R. v. Ashling*, 160 Ill. 373; *In re Bank of Hindustan*, 2 Hen. & M. (Eng.) 666; *Clinch v. Financial Corporation*, L. R. 4 Ch. App. (Eng.) 117; *In re Empire Assurance Corporation*, L. R. 4 Eq. (Eng.) 341.

and the receiving by its owners of stock in the other company in exchange.²⁰ Any bank merged in the consolidation is still liable for its debts and may be sued therefor, unless the statute providing for the consolidation otherwise provides.²¹

Again, the assets of such a merged bank may be reached, though in possession of the consolidated bank, by its creditors.²² It would be indeed a hard doctrine could a bank escape its liabilities by hiding under the shadow of another. Nor can a consolidated bank which renews notes previously given by the others evade payment on the ground that the statute authorizing the consolidation does not render the new corporation liable for the indebtedness of the constituent companies.²³

4. **Renewal or Extension of Charter.**

A charter may be enlarged,²⁴ renewed, or extended. And a bank that has applied for an extension, which is treated by the public and state as having been granted, has a legal continued existence.²⁵ The national banking law provides for renewal or extension of the charters of these institutions,²⁶ but in executing the law hardly a question has arisen requiring judicial determination. All the obligations due to, or from the re-chartered bank have just the same force as before.²⁷

20 *Bonnet v. First Nat. Bank*, 24 Tex. Civ. App. 613, 617.

21 *Donnelly v. Hearndon*, 41 W. Va. 519.

22 *Ibid.* *Overstreet v. Citizens' Bank*, 12 Okla. 383.

23 *Matter of Utica Nat. Brewing Co.*, 154 N. Y. 268. A, the principal stockholder of a bank, contracted with a second bank to close, to surrender thereto its assets and be protected in its obligations and become its president. The second bank received the note of S, endorsed by A, which was renewed by the cashier of the second bank without A's knowledge or endorsement. In an action by the bank against him (S having failed) on the ground of concealing his knowledge of S's condition, the bank did not succeed, it appearing that S's note could have been collected when it was due, and further that A was under no duty to the bank to disclose S's relation or condition to himself. *Bank v. Watson*, 74 S. W. (Ark.) 11.

24 *State v. German Sav. Bank*, 63 At. (Md.) 481.

25 *Campbell v. Perth Amboy Ship Building Co.*, 62 At. (N. J.) 319.

26 Act of July 12, 1882, Ch. 290; *National Ex. Bank v. Gay*, 57 Conn. 224; *First Pres. Church v. National State Bank*, 57 N. J. Law 27. See Chap. I, §17.

27 *First National Bank v. Brenneman*, 114 Pa. 315, 319.

The law provides for the creation of a committee to appraise the shares of the stockholders who wish to withdraw. In performing this duty they possess no judicial functions, and may report verbally or in writing.²⁸ Any mistake made in their appraisal may be corrected within thirty days after making their report.²⁹

The statute providing for the renewal or continuance of the charter of a bank may alter the original provisions. If they are not altered the bank continues as before, and is liable for both periods, the original and extended. Its by-laws, too, preserve their vitality.³⁰

5. Conversion of State Into National Bank.

The national banking law provides for the conversion of state banks into national associations,³¹ and by virtue of it many changes have been effected. The transition does not disturb the relation of either the stockholders or officers, nor enlarge or diminish the assets or liabilities of the institution.³² The change is a transition, not a creation. Consequently the converted bank can sue to recover loans made before as well as after conversion;³³ it is liable for the circulating notes of the former bank and all its other obligations;³⁴ which cannot be

28 Ibid. A statute giving a committee discretion cannot be reviewed for a mistake in judgment. *Haight v. Day*, 1 Johns. Ch. (N. Y.) 18; *Walker v. Devereaux*, 4 Paige (N. Y.) 229.

29 *National Bank v. Brenneman*, 114 Pa. 315, 319.

30 *Campbell v. Watson*, 62 N. J. Eq. 396.

31 Rev. Stat. §5154.

32 *Coffey v. National Bank*, 46 Mo. 140, 143; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147, 151; *New York Grocers' Nat. Bank v. Clark*, 32 How. Pr. (N. Y.) 160; *City Nat. Bank v. Phelps*, 97 N. Y. 44, 50; *Thorp v. Wegefarth*, 56 Pa. 82; *Kelsey v. National Bank*, 69 Pa. 426; *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412, 418; *Scofield v. State Nat. Bank*, 9 Neb. 316.

33 *City Nat. Bank v. Phelps*, 97 N. Y. 44; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; *Metropolitan Nat. Bank v. Claggett*, 141 U. S. 520, affg. 125 N. Y. 729 and 56 Hun 578; *Michigan Ins. Bank v. Eldred*, 143 U. S. 293.

34 *Metropolitan Nat. Bank v. Claggett*, 141 U. S. 520; *Pelletier v. State Nat. Bank*, 38 So. (La.) 132.

impaired or affected in any way by state legislation;³⁵ the former directors are continued until others are elected;³⁶ the former stockholders cannot be deprived of their share of the surplus,³⁷ and lastly, the controller's certificate given to the converted bank is conclusive of the regularity of the conversion.³⁸

Many of the states have passed enabling acts for banks desirous of becoming national associations,³⁹ though they can be legally established without state action.⁴⁰ But a state cannot impose any bonus or other tax on a state bank that reorganizes as a national one, even though aided by state legislation.⁴¹

Two-thirds in amount of the stock can effect a conversion, without the consent of the holders of the remainder.⁴² And when a new bank is thus organized as the successor of the other, it can retain the assets.⁴³ Moreover, a married woman who is a stockholder may consent to the conversion.⁴⁴ Lastly, a bequest of bank stock is not affected by the bank's conversion.⁴⁵

Statutes of limitation doubtless operate on the obligations of the former bank in the same manner as though no conversion had been effected. Consequently, the converted bank is liable

35 Ibid. If the notes presented for redemption had never been put into circulation, but were lost or stolen, the bank is not liable therefor. And if the proof shows that the presenter did not pay more than \$25.00 for \$10,000, he will be treated as a finder, and as having acquired them with notice of all the facts attending their issue. *Pelletier v. State Nat. Bank*, 38 So. (La.) 132.

36 *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308, 341.

37 *State v. Phoenix Bank*, 34 Conn. 205; *State v. Hartford Nat. Bank*, 34 Conn. 240.

38 *Keyser v. Hitz*, 2 Mackey (D. C.) 473; *Casey v. Galli*, 94 U. S. 673.

39 *Stetson v. City of Bangor*, 56 Me. 274; *Flint v. Board of Aldermen*, 99 Mass. 141; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147.

40 Ibid. See also *Thomas v. Farmers' Bank*, 46 Md. 43.

41 *State v. National Bank*, 33 Md. 75.

42 *Keyser v. Hitz*, 2 Mackey (D. C.) 473.

43 *Bank v. McIntire*, 40 Ohio 428.

44 *Keyser v. Hitz*, 2 Mackey (D. C.) 473, 490.

45 *Maynard v. Bank*, 7 Phila. 6.

for the redemption of the notes issued by the old bank, though presented more than six years after its conversion.⁴⁶

To facilitate the reorganization of a bank, on several occasions an agreement has been formed among the stockholders that a committee should subscribe for the entire amount, and apportion it among all the members. Such agreements, made in good faith, have usually been sustained, nor will a subsequent subscription outside the agreement invalidate the reorganization if, in the end, the proper deduction is made so that there is no over-issue. The agreement, while honestly executed, will be liberally construed to effectuate the intentions of the parties.⁴⁷

6. State Supervision.

Most of the states supervise the business of their banking corporations. That the legislature possesses power to regulate and control the business of banking is beyond the sphere of questioning.⁴⁸ That body may authorize an officer to adopt a reasonable system of inspection and reports, with the view of protecting the public and preventing the dissipation of trust funds.⁴⁹ Whether the state can supervise the business of a private banker has been questioned, but the tendency clearly is toward the exercise of such power.⁵⁰

7. National Supervision.

The chief administrator of the national banking law is the Controller of the Currency, who is a national officer and not subject to the jurisdiction of the court.⁵¹ Besides him is a deputy whose acts are presumed to be in conformity with

⁴⁶ *Metropolitan Nat. Bank v. Claggett*, 141 U. S. 520.

⁴⁷ *Somerset Nat. Banking Co. v. Adams*, 24 Ky. L. Rep. 2083.

⁴⁸ See Chap. I. §9; *State v. Struble*, 104 N. W. (S. Dak.) 465.

⁴⁹ *Ibid.*

⁵⁰ *State v. Richcreek*, 77 N. E. (Ind.) 1085; *State v. Woodmansee*, 1 N. Dak. 246; *State v. Struble*, 104 N. W. (S. Dak.) 465.

⁵¹ *Case v. Terrell*, 11 Wall. (U. S.) 199; *Van Antwerp v. Hulburt*, 7 Blatch. (U. S.) 426 and 8 Blatch. 282.

law.⁵² Most of the states have a supervising officer whose authority, like that of the national bank supervisor, is defined by statute.

8. Banks Must Make Reports.

The banks, both state and national, are required to make reports to the officers of their respective governments. Not infrequently they either make wrongful ones, or none at all. If they are forbidden to sue when none are made, this does not deprive them of the use of the federal courts, for a state cannot restrain the jurisdiction of the federal tribunals. But a state can deprive an offending bank of access to its own tribunal.⁵³

9. Official and Judicial Construction of Reports.

These reports should be liberally construed, and a substantial compliance with the statutes will satisfy the law.⁵⁴ If the facts required must be made in two separate reports, the law is not exacting in which report they appear.⁵⁵ As Justice Allen has remarked: "The reports of corporations should receive a reasonable interpretation and excessive nicety or exactness should not be exercised in bringing them to the test of the statutes."⁵⁶ And if a false report is received by a public examiner signed by only one director, though it should have been signed by two others, it is sufficient to sustain an information against the certifying officer.⁵⁷

10. Consequences of Not Making Them Within Required Period.

A bank's neglect to make them within the prescribed period

⁵² *Young v. Wemple*, 46 Fed. 354. He can sign an organization certificate. *Keyser v. Hitz*, 133 U. S. 138, revg. 2 Mackey 473.

⁵³ *Barling v. Bank*, 1 C. C. A. (U. S.) 510; *Bank v. Alaska Imp. Co.*, 97 Cal. 28; *Bank v. Cahn*, 97 Cal. 463.

⁵⁴ *Bank v. Alaska Imp. Co.*, 97 Cal. 28. See Chap. VIII. §18.

⁵⁵ *Ibid.* *Bank v. Madison*, 99 Cal. 125.

⁵⁶ *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 66.

⁵⁷ *State v. Struble*, 104 N. W. (S. Dak.) 465; *Cochran v. United States*, 157 U. S. 286.

does not work self-destruction.⁵⁸ On the other hand, a state official is not required to receive a belated report unless adequate reason can be given for the delay.⁵⁹

The statutes usually visit some punishment on directors or trustees for their neglect to make reports. Formerly, as these statutes possessed to the judicial mind a penal character they could be enforced only in the creating state, where the bank lived.⁶⁰ Now almost everywhere a broader construction is put on such statutes; they are declared to be not penal "in the international sense," and consequently can be enforced in other states.⁶¹ The true test of such a statute is, "whether its purpose is to punish an offence against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."⁶² This is another wise attempt to supplant a narrow rule with a broader one whose operation will serve the interests of the people as fully in one state as in another. Furthermore, as the liability is contractual, the statute of limitations pertaining to contracts rather than to penalties, governs the period of liability.⁶³

11. False and Erroneous Reports.

Directors occasionally make false and erroneous reports, and it is not always easy to draw the line of liability. As this subject has been fully considered in another chapter, nothing more need be added here.⁶⁴

58 *Bank v. Alaska Imp. Co.*, 97 Cal. 28.

59 *People v. Campbell*, 14 Ill. 400.

60 *Derrickson v. Smith*, 27 N. J. Law 166; *Halsey v. McLean*, 94 Mass. 438, 441; *Garrison v. Howe*, 17 N. Y. 458. See Chap. VIII. §41.

61 *Huntington v. Attrill*, 146 U. S. 657, 673, containing an exhaustive opinion by Justice Gray.

Contra.—*Losee v. Bullard*, 79 N. Y. 404; *Chapman v. Comstock*, 58 Hun (N. Y.) 325, 331.

62 *Ibid.*

63 *Nebraska Nat. Bank v. Walsh*, 68 Ark. 433, and cases cited in brief.

Contra.—*State Sav. Bank v. Johnson*, 18 Mont. 440. In this case it was also decided that if annual defaults continued, the effect of them was not to renew the directors' liability.

64 Chap. VIII. §18.

CHAPTER III.

REGULATIONS AND USAGE.

- | | |
|--|---|
| 1. By-laws. | 9. Validity and effect of usage. |
| 2. Amendments. | 10. Modification of law by usage. |
| 3. Authority to make them. | 11. Limitations to usage. |
| 4. By-laws judicially approved. | 12. Knowledge of usage. |
| 5. By-laws judicially disapproved. | 13. Local usage. |
| 6. Abrogation of by-laws by non-usage. | 14. Private or particular usage. |
| 7. National bank by-laws. | 15. How usage is proved. |
| 8. Stock by-laws. | 16. Effect of change of usage on previous contract. |

1. By-laws.

Statutory regulations for conducting the banking business may be supplemented by every bank with such other regulations, in harmony with law, as its interests may require.¹ Whether they possess this character or not is a question for the courts to decide.²

Such regulations or by-laws are regarded as a contract between bank and customer, having proper notice of them,³ for whom they are intended.⁴ The ordinary rules of construc-

¹ Union Bank v. Guice, 2 La. Ann. 249; Seneca Co. Bank v. Lamb, 26 Barb. (N. Y.) 595.

² State v. Bank, 5 Martin (La.) 327, 344; Boisot on By-Laws, §88, and cases cited.

³ Ackenhausen v. People's Sav. Bank, 110 Mich. 175; White v. Commonwealth Nat. Bank, Fed. Cas. No. 17, 544. By accepting a deposit book with the by-laws printed therein, a depositor is charged with notice. Cosgrove v. Provident Sav. Institution, 64 N. J. Law, 653, and other cases cited in note 4. What is notice to the public of a by-law, see note 25 L. R. A. 48. An agreement to a rule, that all notices to depositors placarded in the bank shall be deemed personal to every depositor, does not have a retroactive effect and include notices placarded before becoming depositors. Ranney v. Bowery Sav. Bank, 39 N. Y. Misc. 301.

⁴ Wallace v. Lowell Institution, 7 Gray (Mass.) 134, 137; Goldrick v. Bristol Co. Sav. Bank, 123 Mass. 320; Kimins v. Boston Sav. Bank, 141

tion apply to them;⁵ they do not affect third persons;⁶ operate only in the future;⁷ and must be proved in court like other facts, for they are not judicially noticed.⁸

The officers of a bank are presumed to know them, and are bound thereby so far as they determine the relation between the bank and themselves. Consequently, an officer cannot justly complain of a by-law providing for his removal or discharge at the pleasure of the bank, though he might not appreciate its application to himself.⁹

All the stockholders are also presumed to know them;¹⁰ indeed, this presumption is embedded in the principle that by-laws form a contract between a bank and its members.¹¹

2. Amendments.

As by-laws require at least occasional amendment, they always provide how this can be done. Usually, a notice must be given of the proposed action.¹² Unless this is given, any change by resolution enlarging the authority of an officer, affecting a depositor, or other matter, is invalid.¹³

As a contract relation exists between bank and depositor, the terms of which are largely embodied in by-laws, their alteration by the bank alone, without the consent of the deposi-

Mass. 33; *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78; *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 551; *Cosgrove v. Provident Sav. Institution*, 64 N. J. Law 653, revg. 64 N. J. Law 39; *Kummel v. Germania Sav. Bank*, 127 N. Y. 488, 492; *Appleby v. Erie Co. Sav. Bank*, 62 N. Y. 12, 17; *Gifford v. Rutland Sav. Bank*, 63 Vt. 108.

5 See cases in note 4.

6 *Mech. & Farmers' Bank v. Smith*, 19 Johns. (N. Y.) 115; *State v. Overton*, 24 N. J. Law, 435; *Driscoll v. West Bradley Manfg. Co.*, 59 N. Y. 96, 102; *Bank v. Pinson*, 58 Miss. 421, 438. See Chap. IV. §14.

7 *People v. Fire Department*, 31 Mich. 458, 465.

8 *Haven v. New Hampshire Asylum*, 13 N. H. 532; *Lucas v. City of San Francisco*, 7 Cal. 463, 474.

9 *Darrah v. Wheeling Ice Co.*, 50 W. Va. 417.

10 *Purdy v. Bankers' Life Assn.*, 101 Mo. App. 91; *Hill v. Rich Hill Coal Co.*, 119 Mo. 9, 26; *Came v. Brigham*, 39 Me. 35.

11 See Chap. IV. §25.

12 *French v. O'Brien*, 52 How. Pr. 394.

13 *Ibid.*

tor, is a somewhat arbitrary exercise of authority. Yet by-laws that provide for reasonable amendment without consulting a bank's depositors have, on several occasions, been declared valid.¹⁴

Depositors must be notified of changes,¹⁵ unless they have agreed to dispense with notification,¹⁶ depending on the wisdom and honesty of the bank, also of obtaining knowledge of amendments in a less formal manner.

When notice of changes is not thus waived by a by-law accepted by a depositor, he is not bound by them unless he has expressly assented to them, or, having knowledge of them, has expressed no dissent.¹⁷

3. Authority to Make Them.

Authority to make them, unless statute or custom has otherwise prescribed,¹⁸ vests in the stockholders¹⁹ who, in turn, unless expressly forbidden, may delegate their authority to the directors.²⁰ On the other hand, the latter cannot thus act unless authority has been conferred on them, as above described.²¹

Furthermore, in extending a bank's charter, the by-laws re-

14 *Kimins v. Boston Sav. Bank*, 141 Mass. 33; *Hudson v. Roxbury Institution*, 176 Mass. 522.

15 *Hudson v. Roxbury Institution*, 176 Mass. 522; *Kimins v. Boston Sav. Bank*, 141 Mass. 33; *Boyden v. Bank*, 65 N. C. 13, 18.

16 *Hudson case*, 176 Mass. 522.

17 *Kimins v. Boston Sav. Bank*, 141 Mass. 33. Whether a by-law is a new one, or an amendment, see *Murphy v. Pacific Bank*, 130 Cal. 542.

18 *Bank of Attica v. Manufacturers & Traders' Bank*, 20 N. Y. 501, 506; *Bank v. Pinson*, 58 Miss. 421; *Union Bank v. Ridgely*, 1 Har. & Gill (Md.) 324, 413.

Contra.—*In re Klaus*, 67 Wis. 401, 405.

19 *Brinkerhoff-Farris Trust Co. v. Home Lumber Co.*, 118 Mo. 447, 457; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Albers v. Merchants' Exchange*, 39 Mo. App. 583; *State v. Curtis*, 9 Nev. 325; *Morton Gravel Road Co. v. Wysong*, 51 Ind. 4.

20 *Rex v. Spencer*, 3 Burr. (Eng.) 1827, 1837; *Heintzelman v. Druids' Assn.*, 38 Minn. 138, 141; *National Banking Law*, Rev. Stat. §5136.

21 *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249, 253; *Morton Gravel Road Co. v. Wysong*, 51 Ind. 4.

main alive,²² nor do they die through long neglect to enforce them.²³

Again, while a by-law cannot be secretly adopted, it need not possess a written form;²⁴ and a by-law informally adopted may be subsequently ratified and approved, without any record of adoption, by the usage and acts of the bank and parties dealing with the institution.²⁵

Though by-laws are usually prepared and approved at a meeting of stockholders before receiving the certificate of their incorporation, they will be legally regarded as by-laws of the bank when they are thus treated by the directors.²⁶

4. By-laws Judicially Approved.

By-laws that have received judicial approval relate to specific hours for doing business;²⁷ for receiving special deposits by savings banks on interest;²⁸ for paying general deposits on presentation of the pass book;²⁹ for requiring notice to be given of the loss of a pass-book;³⁰ for giving a bond of indemnity before issuing another;³¹ for dividing the business of a bank in order to facilitate the doing of it;³² for requiring officers to give bonds;³³ for requiring a transfer of stock to be recorded.³⁴

22 *Campbell v. Watson*, 62 N. J. Eq. 396.

23 *Ibid.*

24 *Bank v. Pinson*, 58 Miss. 421, 439.

25 *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308, 335; *Bank v. Pinson*, 58 Miss. 421, 439. "By-laws may be adopted by the acts and conduct of the corporation as well as by express vote or adoption in writing, unless it is otherwise provided." *Germania Mining Co. v. King*, 94 Wis. 439.

26 *Graebner v. Post*, 119 Wis. 392.

27 *Marshall v. Am. Express Co.*, 7 Wis. 1, 24.

28 *Heironimus v. Sweeney*, 83 Md. 146.

29 *Wall v. Provident Institution*, 88 Mass. 320; *Warhus v. Bowery Sav. Bank*, 21 N. Y. 543.

30 *Mitchell v. Home Sav. Bank*, 38 Hun (N. Y.) 255; *Warhus v. Bowery Sav. Bank*, 5 Duer (N. Y.) 67; *Burrill v. Dollar Sav. Bank*, 92 Pa. 134.

31 *Mitchell case*, 38 Hun (N. Y.) 255.

32 *Palmer v. Yates*, 3 Sand. (N. Y.) 137.

33 *Savings Bank v. Hunt*, 72 Mo. 597.

34 *Farmers' & Merch. Bank v. Wasson*, 48 Iowa 336; *Chouteau Spring*

Such a requirement is proper that the bank may know who are its members, but a transfer between the parties is valid without executing this requirement.³⁵ And in some States a by-law requiring the stockholders of a bank to offer their stock first to their own company is regarded proper, as there is no good reason why the members should not reserve to themselves the right of choosing their associates.³⁶

5. By-laws Judicially Disapproved.

The courts have disapproved by-laws declaring that the safe-keeping of deposits is at the depositors' risk;³⁷ that payments must be examined at the time of making them;³⁸ that stockholders cannot examine the books of their bank;³⁹ that they cannot vote for an increase of stock, or make transfers, without the approval of the directors.⁴⁰ But an unreasonable by-law "may be good as a contract."⁴¹ What by-laws may be adopted regulating the transfer of stock will be considered in the next chapter.⁴²

Again, a bank cannot make a by-law constituting an officer, or the directors or trustees a final authority for determining a fact, and thus ousting a court of its jurisdiction whenever an appeal is made thereto to review and correct the determination if regarded erroneous. Thus a bank provided by by-law

Co. v. Harris, 20 Mo. 382, 388; St. Louis Perpetual Ins. Co. v. Goodfellow, 9 Mo. 149, 153.

35 Bank v. Smalley, 2 Cow. (N. Y.) 770. See Ch. IV. §14.

36 Barrett v. King, 181 Mass. 476.

Contra.—Brinkerhoff-Farris Trust Co. v. Home Lumber Co., 181 Mo. 447.

37 White v. Commonwealth Nat. Bank, Fed. Cases No. 17, 544.

38 Mech. & Farmers' Bank v. Smith, 19 Johns. (N. Y.) 115.

39 Cockburn v. Union Bank, 13 La. Ann. 289.

40 McNulta v. Corn Belt Bank, 164 Ill. 427; Orr v. Bigelow, 14 N. Y. 556, affg. 20 Barb. 21; Farmers' & Merch. Bank v. Wasson, 48 Iowa 336. See *In re Klaus*, 67 Wis. 401.

41 Purdy v. Bankers' Life Assn., 101 Mo. App. 91; Goddard v. Merchants' Exchange, 78 Mo. 609; Austin v. Searing, 16 N. Y. 112. See *Jennings v. Bank*, 79 Cal. 323.

42 Chap. IV. §§13-22. See also note, 43 Am. St. Rep. 152-158.

that no depositor should receive his principal or interest without producing his book "unless it be proved to the satisfaction of the trustees or the treasurer that such book shall have been lost or destroyed, in which case a legal discharge shall be given." Treating the by-law as a contract between the parties, nevertheless the bank "could not thereby render its treasurer or trustees the final arbiter of the question."⁴³

6. Abrogation of By-laws by Non-usage.

A by-law may be abrogated by non-usage. By long continued official disregard, known by the stockholders and not incurring their disapproval, their acquiescence may be presumed.⁴⁴ But if a by-law is wholesome, the directors cannot, by their sole disregarding action, consider it as repealed.⁴⁵

7. National Bank By-laws.

A majority of the directors at a regular or legally called meeting, a quorum being present, may enact by-laws.⁴⁶ And by-laws though informally adopted, may be subsequently ratified, and without any record of adoption may be proved by the usage and acts of the bank.⁴⁷

8. Stock By-laws.

As the common law is strongly opposed to secret liens, a bank can impose a lien on the stock of a member only by spe-

⁴³ *Webber v. Cambridgeport Sav. Bank*, 186 Mass. 314. Yet in *Miles v. Schmidt*, 168 Mass. 339, 340, the court declared that "if the question were a new one, no objection would be found to permitting parties to select their own tribunals for the settlement of civil controversies, even though the result might be to oust the courts of jurisdiction in such cases."

⁴⁴ *Blair v. Metropolitan Sav. Bank*, 27 Wash. 192. If a by-law requires the president and cashier to negotiate a loan, and it has become customary for the cashier to do it alone, the bank cannot deny the validity of his action. *Christie v. Sherwood*, 113 Cal. 526.

⁴⁵ *Campbell v. Watson*, 62 N. J. Eq. 396, 421.

⁴⁶ *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308, 335.

⁴⁷ *Ibid.* *State v. Curtis*, 9 Nev. 325, 335; *Hagerman v. Ohio B. & Sav. Assn.*, 25 Ohio St. 186; *Marsh v. Mathias*, 19 Utah 350.

cific statute or charter,⁴⁸ or by-law resting on legislative authority.⁴⁹ The national banking law plainly provides that no lien can be acquired by a bank on its stock in this way;⁵⁰ likewise some of the State banking laws.⁵¹ That authority to make by-laws regulating the management of the business of a bank justifies a bank in adopting a by-law establishing a lien on its stock, as some courts have declared, is therefore a principle opposed to the general current of authority.⁵²

By the creation of such a lien, the purchaser or assignee acquires only an equitable right to the balance after the bank's lien is discharged.⁵³

48 *Driscoll v. West Bradley Mfg. Co.*, 59 N. Y. 96, 102; *Steamship Dock Co. v. Heron*, 52 Pa. 280; *Merchants' Bank v. Shouse*, 102 Pa. 488; *Mass. Iron Co. v. Hooper*, 7 Cush. (Mass.) 183; *German Security Bank v. Jefferson*, 10 Bush (Ky.) 326; *Bank v. Bonnie*, 102 Ky. 343; *Dorr v. Life Ins. Clearing Co.*, 71 Minn. 38; *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299. See Ch. IV. §13.

49 *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Bank v. Pinson*, 58 Miss. 421; *Kahn v. Bank*, 70 Mo. 262; *Mohawk Nat. Bank v. Schenectady Bank*, 151 N. Y. 665, affg. 78 Hun 90; *Driscoll v. West Bradley Mfg. Co.*, 59 N. Y. 96; *Reese v. Bank*, 14 Md. 271; *Nesmith v. Washington Bank*, 6 Pick. (Mass.) 324; *Tuttle v. Walton*, 1 Kelly (Ga.) 43; *Cunningham v. Ala. Life Ins. & Trust Co.*, 4 Ala. 652; *Steamship Dock Co. v. Heron*, 52 Pa. 280; *Pendergast v. Stockton*, 2 Saw. (U. S.) 108; *Union Bank v. Laird*, 2 Wheat. (U. S.) 390; *Mech. Bank v. Seton*, 1 Pet. 299; *Brent v. Bank*, 10 Pet. 596. A statute providing that "no shares shall be transferred until all previous calls shall have been paid in," does not prevent a bank from further providing by by-law that no transfer shall be made while the stockholder is indebted to it. *In re Bachman*, 2 Fed. Cas. No. 707.

50 *Bullard v. Bank*, 18 Wall. (U. S.) 589; *Bank v. Lanier*, 11 Wall. 369; *Evansville Nat. Bank v. Metropolitan Nat. Bank*, 2 Biss. (U. S.) 527; *Bridges v. National Bank*, 185 N. Y. 146; *Buffalo German Ins. Co. v. Third Nat. Bank*, 162 N. Y. 163; revg. 29 App. Div. 137 and reviewing many cases; *Conklin v. Second Nat. Bank*, 45 N. Y. 655; *Rosenbach v. Salt Springs Nat. Bank*, 53 Barb. (U. S.) 495; *Delaware Co. v. Oxford Iron Co.*, 38 N. J. Eq. 340; *Second Nat. Bank v. National State Bank*, 10 Bush (Ky.) 367; *Goodbar v. City Nat. Bank*, 78 Tex. 461; *Fechheimer v. National Exchange Bank*, 79 Va. 80.

51 1 *Brightly's Purdon's Dig. of Pa.* §27, p. 173; 1 *Howell's Annotated Stat. of Mich.*, §3135, p. 788.

52 *Stafford v. Produce Ex. Bkg. Co.*, 61 Ohio St. 160.

53 *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Nesmith v.*

9. **Validity and Effect of Usage.**

Usage plays a conspicuous part in the law of banking.⁵⁴ It has no inflexible boundary; it may apply to a bank, or to all the banks of a community; it cannot be suddenly created, nor, save by statutory change, suddenly disappear. Nevertheless, as changes are constant, there is a doubtful time whether usage exists or not. These statements seem needful because the extension in the exercise of the authority by bank officers has been continuous, springing largely from the necessities of the business. Nowhere has the modern tide of usage swept away so many of the older rules, showing how often the judicial finger has written only on the sand.

Thus the law requires a bank directory to lend its money, but, unless the common law is fortified by a mandatory statute, by usage the president, cashier, or a committee may acquire authority to make loans.⁵⁵ In like manner by usage it may be established that an officer can borrow for his bank.⁵⁶

Another illustration may be given, relating to days of grace. Once, three days was the rule everywhere. Yet long ago the highest Federal tribunal declared that the rule had been modified in some places from three days to four, and that the change

Washington Bank, 6 Pick. 324; *Reese v. Bank*, 14 Md. 271. A transfer of stock in violation of such a by-law has been declared void, by virtue of positive law. *Pittsburgh & Connellsville R. v. Clarke*, 29 Pa. 146. A by-law provided that "no transfer of stock shall be allowed or valid so long as the holder is in arrears to the bank or in any form indebted to it." The clause "in arrears" refers to unpaid calls, and the later clause to indebtedness outside of the subscription. *Kahn v. Bank*, 70 Mo. 262.

54 See Ch. XVII. §2.

55 *Bell v. Hanover Nat. Bank*, 57 Fed. 821; *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192. See Chap. VIII. §10.

56 *First Nat. Bank v. Arnold*, 156 Ind. 487. In this case the court remarked that the general usage as to the manner of doing business by national banks in the community and in the vicinity of the borrowing bank, including the methods adopted for supplying the temporary necessities of such banks for money, the nature of the authority required to be shown by the officers of the borrowing banks, and other circumstances connected with such transactions was admissible. *Kraniger v. People's Building Society*, 60 Minn. 94.

must be recognized in paying negotiable instruments.⁵⁷ In like manner a custom may be established in a place to treat certificates of deposit as payable without grace.⁵⁸

10. Modification of Law by Usage.

As usage ripens into law,⁵⁹ when does a later usage modify, supersede, or overcome the law? The Supreme Court of Maryland has stated the answer. "To permit usage to *govern* and *modify* the law, in relation to the dealings of the parties, it must be uniform, certain, and sufficiently notorious to warrant the legal presumption that the parties made their contract with reference to the usage, and not according to the general and established law applicable to the case."⁶⁰

11. Limitations to Usage.

A custom or usage is bounded by well known limitations. It must be reasonable,⁶¹ not opposed to public policy,⁶² mor-

57 Renner v. Bank, 9 Wheat. (U. S.) 581; Bank v. Triplett, 1 Pet. (U. S.) 25.

58 Haddock v. Citizens' Nat. Bank, 53 Iowa 542.

59 Edie v. East India Co., 2 Burr. (Eng.) 1216, 1226; Wilcox v. Wood, 9 Wend. (N. Y.) 346.

60 Stewart, J., Citizens' Bank v. Grafflin, 31 Md. 507, 520. See also Clarke's "Browne on Usages," note y, p. 94, 1st Am. Ed., and Halsey v. Brown, 3 Day (Conn.) 346. "Custom is a law established by long usage. A universal custom becomes common law. Customs are sometimes allowed to prevail contrary to the rules of common law, but in such cases are construed strictly." Savage, Ch. J., Wilcox v. Wood, 9 Wend. (N. Y.) 349. "No contract or agreement can modify a law, but where no principle of public policy is violated, parties are at liberty to forego the protection of the law. Statutory provisions designed for the benefit of individuals may be waived; but, where the enactment is to secure general objects of policy or morals, no consent will render a non-compliance with the statute effectual." State Trust Co. v. Sheldon, 68 Vt. 259.

61 Reasonable usages; in presenting checks, Marrett v. Brackett, 60 Me. 524; Bridgeport Bank v. Dyer, 19 Conn. 136; in settling accounts between banks, Howard v. Walker, 92 Tenn. 452.

Unreasonable usages; to send a draft to the drawer to collect, Whitney v. Esson, 99 Mass. 308, 311; to pay an overdraft, Lancaster Bank v. Woodward, 18 Pa. 357; to refuse to correct a mistake in certification, Second Nat. Bank v. Western Nat. Bank, 51 Md. 128; or in a receipt for the payment of money unless discovered before leaving the bank, Gallatin v.

ality,⁶³ statute,⁶⁴ the express terms of a contract,⁶⁵ or a well known principle of law.⁶⁶ Within these limitations a usage is legal and binding on persons who know or ought to know, by virtue of its notoriety, of it, for they are regarded as contracting with reference thereto.⁶⁷ Indeed, the rule has been extended to all other cases in which they are regarded as blind-

Bradford, 4 Ky. 209; to take the goods belonging to a principal as a pledge for the payment of a balance due from his agent, *Allen v. St. Louis Bank*, 120 U. S. 20.

62 For example, an attempt to change values fixed by law. *Marine Bank v. Chandler*, 27 Ill. 525.

63 *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46, 71.

64 *Perkins v. Franklin Bank*, 21 Pick. (Mass.) 483; *First Nat. Bank v. Nelson*, 105 Ala. 180, 196; *Marine Bank v. Chandler*, 27 Ill. 525; *Dunham v. Gould*, 16 Johns. (N. Y.) 367; *Bank v. Wager*, 2 Cow. (N. Y.) 712; *New York Firemen Ins. Co. v. Ely*, 2 Cow. 678. See *Onondaga Co. Bank v. Bates*, 3 Hill (N. Y.) 53, 57; *Niagara Co. Bank v. Baker*, 15 Ohio St. 68.

A usage, however long continued, conflicting with a bank's charter cannot be sustained. *Mutual Fire Ins. Co. v. Farquhar*, 86 Md. 668.

65 *Renner v. Bank*, 9 Wheat. (U. S.) 581; *First Nat. Bank v. Taliaferro*, 72 Md. 164; *Foley v. Mason*, 6 Md. 37; *Farmers' & Mech. Bank v. Logan*, 74 N. Y. 568; *Bank v. Bissell*, 72 N. Y. 615; *Eaves v. People's Sav. Bank*, 27 Conn. 229, 233; *Deweese v. Lockhart*, 1 Tex. 535; *Allen v. St. Louis Bank*, 120 U. S. 20, 39. For other cases, see Clarke's "Browne on Usage," p. 161-164. "Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement." *Walker, J., Fay v. Strawn*, 32 Ill. 295, 302.

66 *Piscataqua Ex. Bank v. Carter*, 20 N. H. 246; *Woodruff v. Merchants' Bank*, 25 Wend. (N. Y.) 673, *affd.* 6 Hill 174; *Deweese v. Lockhart*, 1 Tex. 535; *Shaw v. Jacobs*, 89 Iowa 713; *First Nat. Bank v. Taliaferro*, 72 Md. 164, 169; *Beckwith v. Farnum*, 5 R. I. 230; *Coppin v. Greenlees*, 38 Ohio St. 275, 281.

67 *Cohea v. Hunt*, 2 Sm. & M. (Miss.) 227; *Bridgeport Bank v. Dyer*, 19 Conn. 136; *Lawrence v. Stonington Bank*, 6 Conn. 521; *Hartford Bank v. Stedman*, 3 Conn. 489; *Bank v. Fitzhugh*, 1 Har. & Gill, (Md.) 239; *Bank v. Magruder*, 6 Har. & J. (Md.) 172; *Jones v. Fales*, 4 Mass. 245; *Lincoln & Kennebec Bank v. Page*, 9 Mass. 155; *City Bank v. Cutter*, 3 Pick. (Mass.) 414; *Boston Bank v. Hodges*, 9 Pick. 420; *Dorchester & Milton Bank v. New England Bank*, 1 Cush. (Mass.) 177, 188; *Warren Bank v. Suffolk Bank*, 10 Cush. 582, 586; *Mussey v. Eagle Bank*, 9 Met. (Mass.) 306, 313; *Allen v. Merchants' Bank*, 15 Wend. (N. Y.) 482, 486; *Bank v. Smith*, 18 Johns. (N. Y.) 230; *Security Bank v. National Bank*,

ly assenting.⁶⁸ Thus a person who sends a check to a bank for collection, tacitly agrees to be bound by all the usages of the institution performing the service.⁶⁹ It need hardly be added that a usage cannot prevail against anyone who is not a party to a contract, though prevailing against the parties themselves.⁷⁰ Whether a usage is good or not is a question of law.⁷¹ No negligent practice, custom or usage can have a legal sanction.⁷²

Furthermore, in conducting business between principal and agent the latter cannot shield himself behind a usage that is opposed to a clear contrary instruction.⁷³

12. Knowledge of Usage.

Surrounded by these restrictions, usage may spring up and modify the law and be recognized, because, in contracting, it

67 N. Y. 458; *First Nat. Bank v. Fiske*, 133 Pa. 241; *Howard v. Walker*, 92 Tenn. 452; *Sahlien v. Bank*, 90 Tenn. 221; *Bank v. Miller*, 105 Ill. App. 224, *affd.* 202 Ill. 410; *Williams v. Gilman*, 3 Maine 281; *Leach v. Perkins*, 17 Me. 465.

Fowler v. Brantly, 14 Pet. (U. S.) 318; *Bank v. Triplett*, 1 Pet. 25; *Brent v. Bank*, 1 Pet. 89; *Renner v. Bank*, 9 Wheat. (U. S.) 581; *Mills v. Bank*, 11 Wheat. 431; *Bank v. New England Bank*, 1 How. (U. S.) 234; *Wiseman v. Chiapella*, 23 How. 368; *Yeaton v. Bank*, 5 Cranch. (U. S.) 49, 52; *Bank v. McKenny*, 3 Cranch C. C. 361; *Patriotic Bank v. Farmers' Bank*, 2 Cranch C. C. 560.

"Usage is a fact; and if it is a particular usage, it must be known to the parties, and, if a general usage, it must be so well established and known that it must be considered that the parties reasonably well acquainted with the trade or business either knew it or ought to have known it." *Field, J.*, *Burnham v. Boston Marine Ins. Co.*, 139 Mass. 399, 405.

68 *Sahlien v. Bank*, 90 Tenn. 221; *Howard v. Walker*, 92 Tenn. 452, 457; *Bank v. Triplett*, 1 Pet. (U. S.) 25; *Fowler v. Brantly*, 14 Pet. 318; *Patriotic Bank v. Farmers' Bank*, 2 Cranch (U. S.) 560.

69 *Sahlien v. Bank*, 90 Tenn. 221, 226. But see Chap. XVII. §10.

70 *Overman v. Hoboken City Bank*, 30 N. J. Law 61, 63; *Lawrence v. Stonington Bank*, 6 Conn. 521; *Bank v. Deneale*, 2 Cranch C. C. (U. S.) 488, 497.

71 *Mussey v. Eagle Bank*, 9 Met. (Mass.) 306, 313.

72 *O'Leary v. Abeles*, 68 Ark. 259; *Minneapolis Sash Co. v. Metropolitan Bank*, 76 Minn. 136, 144; *Bank v. Miller*, 105 Ill. App. 224, *affd.* 202 Ill. 410.

73 *Wanless v. McCandless*, 38 Iowa 20; *D. M. Osborne & Co. v.*

is presumed that the parties had existing usage in mind, and justice requires that full force should be accorded to it. In one of the older and well wrought cases, Justice Storrs remarked, "The presumption is that those who enter into contracts intend to be governed by the general principles of law. It is, however, competent for them to renounce those principles, where public policy does not forbid, and to adopt another rule of action; and the prevalence of a particular legal usage on the subject, variant from those general rules, in the absence of evidence to resist it, affords a rational ground of inference that they intended to do so."⁷⁴

The question still remains for answer, how well known or universal must a principle of common law be to escape modification or overthrow by usage. What headlands on the banking coast remain unmoved by the repeated attacks of business men to change them? That usage cannot cut off days of grace from a bill of exchange;⁷⁵ cannot change the legal effect of a blank endorsement⁷⁶ or power of attorney;⁷⁷ cannot, in many States, excuse the neglect of a notary, even of the highest competency, to make a demand and give notice of the non-payment of a note received by a bank for collection;⁷⁸ are good examples.

13. Local Usage.

Individuals living in the same community with banks are

Rider, 62 Wis. 235; Day v. Holmes, 103 Mass. 306; Greenstine v. Borchard, 50 Mich. 434; Mechem on Agency, §485. See Commercial Bank v. Red River Valley Nat. Bank, 8 N. Dak. 382.

⁷⁴ Kilgore v. Bulkley, 14 Conn. 362, 391.

⁷⁵ Woodruff v. Merchants' Bank, 25 Wend. (N. Y.) 673.

Contra.—See §9.

⁷⁶ Shaw v. Jacobs, 89 Iowa 713.

⁷⁷ First Nat. Bank v. Taliaferro, 72 Md. 164.

⁷⁸ Ayrault v. Pacific Bank, 47 N. Y. 570. A local custom is "too limited to control positive requirement of law. Usage can only regulate the manner of the performance of required acts; it cannot excuse non-performance." Citizens' Nat. Bank v. Third Nat. Bank, 19 Ind. App. 69, 79; Adams v. Otterback, 15 How. (U. S.) 539.

supposed to know bank usage;⁷⁹ and are presumed to act accordingly in doing business with these institutions whether they have actual knowledge of the existence of the usages prevailing among them or not.⁸⁰

"The general course of business in a community, including the universal practice of banks, is a matter of which the courts may take judicial notice."⁸¹

14. Private or Particular Usage.

The usage of a bank in a particular matter is only binding on those who know of its existence, and are presumed to have assented thereto.⁸² Such a usage is that of a bank in crediting a check, endorsed by the owner for collection and delivered by him to a messenger for deposit, to the messenger instead of the owner.⁸³

79 Howard v. Walker, 92 Tenn. 452; Sahlien v. Bank, 90 Tenn. 221; Bank v. Fitzhugh, 1 Har. & Gill (Md.) 239, 248; Bank v. Smith, 18 Johns. (N. Y.) 230.

80 Bank v. Triplett, 1 Pet. (U. S.) 25; Bank v. Fitzhugh, 1 Har. & Gill (Md.) 239; Dorchester & Milton Bank v. New England Bank, 1 Cush. (Mass.) 177, 188; Lincoln & Kennebeck Bank v. Page, 9 Mass. 155. "A local custom, if relied upon as entering into and forming a part of a contract, must be pleaded." Sherwood v. Home Sav. Bank, 109 N. W. (Iowa) 9; Lindley v. First Nat. Bank, 76 Iowa 629.

81 Agawam Bank v. Strever, 18 N. Y. 502, 512; Merchants' Nat. Bank v. Hall, 83 N. Y. 338, 345.

82 Kilgore v. Buckley, 14 Conn. 362. See Bank v. Smith, 18 Johns. (N. Y.) 230. "A usage of universal prevalence becomes a part of the existing law, and is to be noticed ex-officio by the courts of justice; but a particular usage has a circumscribed and limited application, and must be supported by proof." Earle, J., Bank v. Fitzhugh, Har. & Gill (Md.) 239, 248; First Nat. Bank v. Farmers' & Merch. Bank, 56 Neb. 149, 157. A particular custom to bind a customer sending a draft for collection must have been known by him. Bank v. Miller, 105 Ill. App. 224; affd. 202 Ill. 410.

83 Kuder v. Greene, 82 S. W. (Ark.) 836. In an action on a note payable at a bank, evidence of the bank's custom to require payment of interest in advance is admissible. Ellis v. Littlefield, 93 S. W. (Tex. Civ. App.) 171.

15. How Usage is Proved.

A usage is proved generally by parol evidence.⁸⁴ Proof of a single fact will not suffice;⁸⁵ how many repetitions are needful to harden the matter into a usage or custom must always remain one of the open questions of the law.

16. Effect of Change of Usage on Previous Contract.

A usage may be changed or discontinued; in such cases an individual who has contracted with reference to the former usage may claim the benefit thereof unless he has learned through positive notice or otherwise of the change.⁸⁶

Again, a usage may grow up among all the banks of a community,⁸⁷ or in only some of them.⁸⁸

84 *Bank v. Dunn*, 6 Pet. (U. S.) 51; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446; *Renner v. Bank*, 9 Wheat. (U. S.) 581, 587; *Mills v. Bank*, 11 Wheat. 431; *Griffin v. Rice*, 1 Hilton (N. Y.) 184. A usage may be proved by a banker, a bank clerk or bank customer. *Ibid*.

85 *Duvall v. Farmers' Bank*, 9 Gill & J. (Md.) 31; *Chesapeake Bank v. Swain*, 29 Md. 483; *Adams v. Otterback*, 15 How. (U. S.) 539; *Burr v. Sickles*, 17 Ark. 428.

86 *Barnes v. Ontario Bank*, 19 N. Y. 152; *Cumming v. Shand*, 5 Hurl. & N. (Eng.) 95.

87 *Bridgeport Bank v. Dyer*, 19 Conn. 136, 141; *Renner v. Bank*, 9 Wheat. (U. S.) 581; *Bank v. Triplett*, 1 Pet. (U. S.) 25.

88 *City Bank v. Cutter*, 3 Pick. (Mass.) 414, 418; *Boston Bank v. Hodges*, 9 Pick. 420; *Lincoln & Kennebeck Bank v. Page*, 9 Mass. 155; *Smith v. Whiting*, 12 Mass. 6; *Chicopee Bank v. Eager*, 9 Met. (Mass.) 583; *Cohea v. Hunt*, 2 Sm. & M. (Miss.) 227; *Bank v. Smith*, 18 Johns. (N. Y.) 230; *Hotchkiss v. Artisans' Bank*, 52 Barb. (N. Y.) 517; *Mills v. Bank*, 11 Wheat. (U. S.) 431; *Camden v. Doremus*, 3 How. (U. S.) 515; *Patriotic Bank v. Farmers' Bank*, 2 Cranch C. C. (U. S.) 560. A usage existing among any number of banks will not affect one that has not adopted it. *Williams v. National Bank*, 70 Md. 343.

CHAPTER IV.

THE RIGHTS OF STOCKHOLDERS.

1. Who can subscribe.
2. Unsubscribed stock.
3. Oversubscriptions.
4. Fictitious stock.
5. Increase of stock.
6. Fraudulent increase.
7. Who can subscribe for increase.
8. Reduction of stock.
9. Payment for stock.
10. Consequences of non-payment.
 - a. Time of payment.
 - b. Enforcement of subscriptions.
 - c. Remedy for erroneous collections.
11. Recovery by defrauded subscriber.
12. Nature and purpose of certificate.
13. Transfers.
 - a. To whom transfers may be made.
 - b. Bank's regulation of them.
14. Unrecorded transfers between immediate parties.
15. Unrecorded transfer between other parties.
16. Effect of demanding assessments.
17. Responsibility of bank in making transfers.
18. Official tampering with certificate.
19. Remedy for refusal to transfer.
20. Statutory requirements concerning transfer.
21. Effect of transfer on books without surrendering certificate.
22. Other modes of acquiring equitable title.
23. Lien.
24. What language creates a lien.
25. Notice of lien.
26. Bank can hold entire stock.
27. Lien may be waived.
28. What indebtedness is included.
29. Lien does not prevent a sale or transfer.
30. Validity of improper by-law on purchases.
31. Lien survives though debt is barred.
32. Lien of private bank.
33. Lien on dividends.
34. Who are stockholders.
35. Stockholders' meetings.
36. Their right to inspect books.
37. Their right to ratify directorial action.
38. Their right to compel managers to regard the law.
39. Rights of minority.
40. Right to dividend.
 - a. Between assignor and assignee.
 - b. Between life tenant and remainderman.
41. Stock can be taken for owner's debts.

1. Who Can Subscribe.

The persons who can subscribe for stock are designated by statute. Authority has been conferred on charitable organizations;¹ an attorney may subscribe for another person;² and anyone can subscribe orally.³ Whether married women, guardians, trustees, and others acting in a fiduciary capacity can subscribe for stock is a question requiring answer. Doubtless by the laws now regulating the rights of married women in most States they can subscribe for stock,⁴ and act at corporate meetings like other persons.⁵ Yet the more common practice in organizing banks is to subscribe in the name of a man, who transfers the stock to the true owner, after the completion of the organization.⁶ Aliens also may be excluded unless they consent to such taxation on their investments as the State may impose.⁷

2. Unsubscribed Stock.

The balance of the stock not at first subscribed cannot be claimed by the subscribers;⁸ for this the directors therefore may solicit subscriptions, or make any other disposition not contrary to law.⁹

1 *Bishop's Fund v. Eagle Bank*, 7 Conn. 476.

2 *State v. Lehre*, 7 Rich. Law (S. C.) 234. He is not forbidden by a provision that "it shall not be lawful for any person to subscribe for shares in the name of other persons." *Ibid*.

3 *Somerset Nat. Bkg. Co. v. Adams*, 24 Ky. L. Rep. 2083; *Tabler v. Anglo-Am. Association*, 17 Ky. L. Rep. 815.

4 *Witters v. Sowles*, 32 Fed. 767; *Laws of N. Y.*, 1849, Ch. 226. In *re Reciprocity Bank*, 22 N. Y. 9; *Matthewman's Case*, L. R. 3 Eq. (Eng.) 781.

5 See *People v. Webster*, 10 Wend. (N. Y.) 554.

6 In 1886 the Supreme Court of Pa. decided that a married woman could hold and transfer stock, but had no authority to contract to pay for it. But there can be no doubt of her authority to make such a contract now. See opinion of Attorney-General on *Married Women Corporators*, 18 Pa. C. C. 492.

7 *State v. Travellers' Ins. Co.*, 70 Conn. 590. See *Mager v. Grime*, 8 How. (U. S.) 490.

8 *Reese v. Bank*, 31 Pa. 78.

9 *Curry v. Scott*, 54 Pa. 270. See §7.

3. Oversubscriptions.

When an excess of shares has been subscribed, the statute usually prescribes for a reduction of the larger subscriptions.¹⁰ And the directors may go behind the subscription paper of a subscriber who attempts to evade the statute by subscribing in the names of others, and require him to comply with the law.¹¹ If no statute on the subject exists, the bank must reduce the subscriptions pro rata, or in some other manner.¹²

4. Fictitious Stock.

A fictitious stockholder who, for the sake of his example, is induced by a representative of the bank to subscribe, and is told that he may withdraw, or in no event will be bound, is nevertheless liable like any other subscriber.¹³

Again, what remedy has a real subscriber who, after he has been caught, learns that the fictitious subscriber will be required to pay only half as much for his stock, or be released from liability, or in other ways unduly favored? He certainly is justified in rescinding the contract,¹⁴ or, if he has paid for his stock, in recovering the money.

5. Increase of Stock.

A bank whose capital stock is limited by statute cannot, without equal authority, exceed that amount.¹⁵ In many

¹⁰ *Union Bank v. McDonough*, 5 La. 63; *Meads v. Walker*, 1 Hopk. Ch. (N. Y.) 587; *Clarke v. Brooklyn Bank*, 1 Edw. Ch. (N. Y.) 361; *Walker v. Devereaux*, 4 Paige (N. Y.) 229; *Crocker v. Crane*, 21 Wend. (N. Y.) 211; *Haight v. Day*, 1 Johns. Ch. (N. Y.) 18.

¹¹ *Union Bank v. McDonough*, 5 La. 63.

¹² *State v. Lehre*, 7 Rich. Law (S. C.) 234; *Meads v. Walker*, 1 Hopk. Ch. (N. Y.) 587.

¹³ *Wilson v. Hundley*, 96 Va. 96; *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Cas. (Eng.) 317; *Addie v. Western Bank*, L. R. I. Scotch & Div. App. (Eng.) 145; *In re Addlestone Linoleum Co.*, L. R. 37 Ch. Div. (Eng.) 191; *Atwater v. Stromberg*, 75 Minn. 277. See *Atwater v. Smith*, 73 Minn. 507.

¹⁴ *State Bank v. Cook*, 125 Iowa 111; 100 N. W. 72.

¹⁵ *Bank v. Schuylkill Bank*, 1 Pars. Eq. Cases (Pa.) 180; *Cooke v. Marshall*, 191 Pa. 315; *Sutherland v. Olcott*, 95 N. Y. 93; *Salem Mill Dam Corporation v. Ropes*, 6 Pick. (Mass.) 23; *Cartwright v. Dickinson*, 88

States, statutes exist authorizing banks to increase and apportion their capital among their members.¹⁶ If an increase must be authorized by popular vote, which is not taken, the increase is void.¹⁷ And if the law requires payment of the increase in cash, an innocent purchaser of a stockholder who has paid for his stock with stolen funds acquires a good title.¹⁸

A stockholder who is entitled to subscribe for a new issue, to whom permission is refused, must make a formal demand and offer to subscribe and pay for the same within a reasonable time after the increase, as a basis for his action against the bank for its refusal.¹⁹

To increase the capital stock of a national bank, two-thirds of the stockholders must assent; the increase must be paid; and the controller must approve of, and certify the payment of the increase.²⁰ An attempted increase without fulfilling these conditions is invalid and cannot be enforced;²¹ and subscribers who have paid the increase, supposing the requirements of the law to have been observed, can recover either the full amount paid,²² or share with the other creditors.²³

Tenn. 476; *In re Financial Corporation*, L. R. 2 Ch. App. Cases (Eng.) 714.

16 *Comstock v. Willoughby*, Hill & Denio (N. Y.) 271; *State v. Bank, Dudley*, Law (S. C.) 187; *Gray v. Portland Bank*, 3 Mass. 364; *Jones v. Concord & Montreal R.*, 67 N. H. 119; *Jones v. Morrison*, 31 Minn. 140; *State v. Smith*, 48 Vt. 266; *Peck v. Elliott*, 79 Fed. 10.

17 *McNulta v. Corn Belt Bank*, 164 Ill. 427.

18 *McNulta v. Corn Belt Bank*, 164 Ill. 427, affg. 63 Ill. App. 593. In *Olson v. Cook*, 67 Minn. 267, a bank voted to increase its capital, the president paid for his stock with city funds, and afterward sold it to third parties. It was held that in view of the time that had passed between the issue of the stock, the failure of the bank, and the lack of diligence on the part of its holders in discovering the bank's insolvent condition, they had no right to rescind their purchase as against the creditors, whose rights had become vested by the insolvency of the bank. See also *Dunn v. State Bank*, 59 Minn. 221.

19 *Wilson v. Bank*, 29 Pa. 537; *Bonnet v. First Nat. Bank*, 24 Tex. Civ. App. 613.

20 Rev. Stat. §5142; *Delano v. Butler*, 118 U. S. 634, 649.

21 *Winters v. Armstrong*, 37 Fed. 508.

22 *Ibid.*

Though the proceedings relating to the increase may be irregular, and the subscribers may have redress against the bank or the directors, nevertheless they may be as fully liable to the creditors as though the increase had been properly made.²⁴ In all cases the certificate of the controller is conclusive of the regularity of the proceeding, and cannot be questioned in any collateral procedure.²⁵

In making an increase, a different rule applies to stockholders. If their stock is declared invalid, nevertheless they are liable to creditors who have given credit on the faith of their subscription;²⁶ but they are relieved from liability to prior creditors.²⁷ On the other hand, they, in turn, may be creditors of the bank for the money paid for their stock like other creditors.²⁸

6. Fraudulent Increase.

A bank may be held in two ways for the action of an officer who fraudulently overissues certificates of stock: to the last holders for the recognition and registration of their stock, provided they are innocent purchasers; to the original holders who

23 *Schierenberg v. Stephens*, 32 Mo. App. 314; *Nichols v. Stephens*, 32 Mo. App. 330.

24 *Scott v. Dewees*, 181 U. S. 202, affg. 60 U. S. App. 720, 736; *Lantry v. Wallace*, 182 U. S. 536, affg. 97 Fed. 865; *Delano v. Butler*, 118 U. S. 634; *Aspinwall v. Butler*, 133 U. S. 595; *Pacific National Bank v. Eaton*, 141 U. S. 227; *Thayer v. Butler*, 141 U. S. 234; *Handley v. Stutz*, 139 U. S. 417; *Columbia Nat. Bank v. Mathews*, 29 C. C. A. 491, revg. 79 Fed. 558 and 77 Fed. 372; *Brown v. Tillinghast*, 35 C. C. A. 323; *Veeder v. Mudgett*, 95 N. Y. 295; *Palmer v. Bank*, 72 Minn. 266, 277.

Contra.—*Cornell v. First Nat. Bank*, 32 U. S. App. 426; *Scott v. Latimer*, 33 C. C. A. 1, is an elaborate consideration of the liability of a stockholder where an increase has been made and not paid.

25 *Columbia Nat. Bank v. Mathews*, 29 C. C. A. 491; *Latimer v. Bard*, 76 Fed. 536; *Tillinghast v. Bailey*, 86 Fed. 46; *Rand v. Columbia Nat. Bank*, 36 C. C. A. 292.

26 *Veeder v. Mudgett*, 95 N. Y. 295; *Palmer v. Bank*, 72 Minn. 266, 277; *Handley v. Stutz*, 139 U. S. 417.

27 *Ibid.*

28 *Palmer v. Bank*, 72 Minn. 266.

cannot be deprived of their property without their consent or negligence.²⁹

Again, an increase based on a fictitious value of the assets and on notes given by the directors with the understanding that they are not to be paid, is wrongful and the directors thus participating are liable for all losses resulting to the creditors.³⁰

Furthermore, a stockholder who has not been negligent in discovering a fraudulent increase may recover the sum paid for his stock, provided he proceeds at once to enforce his right;³¹ nor will the subsequent insolvency of the bank affect his right of recovery.³² Indeed, a fraudulent subscription to stock may be rescinded after, as well as before the bank's insolvency, provided no considerable time has elapsed since the subscription, and the buyer has been diligent to discover the fraud.³³

To this rule there is a limitation in favor of creditors. Should such a discovery have the effect of depriving them of their just dues, and either he or they must suffer, the law compels him to bear the loss.³⁴

29 *Bank v. Schuylkill Bank*, 1 Pars. Eq. Cases, (Pa.) 180; *People's Bank v. Kurtz*, 99 Pa. 344; *New York R. Co. v. Schuyler*, 34 N. Y. 30; *Fifth Ave. Bank v. Forty-Second St. Ferry R.*, 137 N. Y. 231; *Cincinnati R. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351; *Bridgeport Bank v. N. Y. & N. Haven R.*, 30 Conn. 231; *Moores v. Citizens' Nat. Bank*, 111 U. S. 156, 165; *Bank v. Lanier*, 11 Wall. (U. S.) 369. See *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398; also §11.

A bank which paid fraudulent overissues with its earnings and withdrew them, having received nothing therefor, did not increase its capital. *Commonwealth v. Bank*, 9 B. Mon. (Ky.) 1.

30 *Cockrill v. Abeles*, 30 C. C. A. 223. See Chap. V. §3.

31 *Newton Nat. Bank v. Newbegin*, 20 C. C. A. 339, and 14 C. C. A. 71, revg. 67 Fed. 701.

32 *Ibid.*

33 *Wallace v. Bacon*, 86 Fed. 553; *Newton Nat. Bank v. Newbegin*, 20 C. C. A. 339.

34 *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380; *Upton v. Tribilcock*, 91 U. S. 45; *Chubb v. Upton*, 95 U. S. 665; *Payson v. Withers*, 5 Biss. (U. S.) 269; *Newton Nat. Bank v. Newbegin*, 20 C. C. A. 339; *In re Reciprocity Bank*, 22 N. Y. 9; *Duffield v. Barnum Wire Works*, 64 Mich. 293;

7. Who Can Subscribe for Increase.

The old stockholders have the first right to subscribe, unless a statute otherwise prescribes, or the increase is issued to pay for additional property,³⁵ and in due proportion of their shares to the new ones.³⁶ And the same rule applies to stock authorized but not issued remaining in the bank's possession.³⁷ With still greater force does the rule prohibit a minority of the directors from issuing it to themselves and conspiring friends for the purpose of wresting control from the majority.³⁸ The stockholders can also sell this right if not desirous of subscribing;³⁹ and those who are deprived of their right by the directors can sue the bank and recover in the way of damages the worth of the shares to which they were entitled above par.⁴⁰

8. Reduction of Stock.

The rule has long prevailed that a bank created by the legislature with a fixed capital cannot diminish the amount without equal authority.⁴¹ Nor can any portion of its capital be

Graff v. Pittsburg R., 31 Pa. 489; *McHose v. Wheeler*, 45 Pa. 32; *Oakes v. Turquand*, L. R. 2 H. of L. (Eng.) 325, 344; *Wright's Case*, L. R. 7 Ch. App. (Eng.) 55, 60; *Kent v. Freehold Land Co.*, L. R. 3 Ch. App. (Eng.). 493. But see *Florida Land Co. v. Merrill*, 2 C. C. A. 629, and Chap. V. §14, 1.

35 *Bonnet v. First Nat. Bank*, 24 Tex. Civ. App. 613, 615; *Eidman v. Bowman*, 58 Ill. 444; *Meredith v. N. J. Zinc & Iron Co.* 55 N. J. Eq. 211, 219; *Hammond v. Edison Ill. Co.*, 131 Mich. 79; *Reese v. Bank*, 31 Pa. 78; *Wilson v. Bank*, 29 Pa. 537; *Cunningham's Appeal*, 108 Pa. 546; *State v. Bank of Charleston*, Dudley, Law (S. C.) 187.

36 *Gray v. Portland Bank*, 3 Mass. 364; *Eidman v. Bowman*, 58 Ill. 444, 447; *Jones v. Morrison*, 31 Minn. 140, 153, and cases cited; *State v. Smith*, 48 Vt. 266; *Hammond v. Edison*, Ill. Co., 131 Mich. 79.

37 *Luther v. C. J. Luther Co.*, 118 Wis. 112, and cases cited.

38 *Ibid.*

39 *Hammond v. Edison Ill. Co.*, 131 Mich. 79, 85; *Jones v. Concord & Montreal R.*, 67 N. H. 234, 240.

40 *Gray v. Portland Bank*, 3 Mass. 364.

41 *Bank v. Schuylkill Bank*, 1 Pars. Eq. Cases (Pa.) 180; *Cooke v. Marshall*, 191 Pa. 315; *Crandall v. Lincoln*, 52 Conn. 73; *Salem Mill Dam Corporation v. Ropes*, 6 Pick. (Mass.) 23; *Wood v. Dummer*, 3 Mason (U. S.) 308; *Stokes v. Continental Trust Co.*, 186 N. Y. 285.

withdrawn in the form of loans;⁴² or by the purchase of its stock, without positive authority;⁴³ or in violation of positive law.⁴⁴ Furthermore, a portion of its capital set free by a lawful reduction of the amount, cannot be retained as a surplus fund.⁴⁵ It may be added, this rule has never prevented an incidental reduction caused by taking the stock of a debtor to discharge his indebtedness and thus prevent the bank from incurring a loss.⁴⁶ Indeed, the purchase may be regarded not as a reduction, but as existing and subject to sale, if need be, for the benefit of the bank's creditors.⁴⁷

This rule, though still maintained by some tribunals with scarce diminished vigor,⁴⁸ is giving way to another more in harmony with the broader exercise of authority within just and lawful limitations. By the newer rule a banking or other corporation, unless expressly forbidden, can purchase its own stock when acting in good faith and without impairing the rights or security of creditors⁴⁹ or stockholders.⁵⁰ This

42 *State v. Essex Bank*, 8 Vt. 489.

43 *Holcomb v. Gibson*, Ohio Unrep. Cases, 783. See §9.

44 *Gillet v. Moody*, 31 N. Y. 479.

45 *Seeley v. New York Nat. Ex. Bank*, 78 N. Y. 608, affg. 8 Daly 400. But see *McCann v. First Nat. Bank*, 112 Ind. 354.

46 *Draper v. Blackwell*, 138 Ala. 182.

47 *Ibid.*

48 *Trevor v. Whitworth*, L. R. 12 App. Cases (Eng.) 409; *In re London, Hamburg and Cont. Bank*, L. R. 5 Ch. App. (Eng.) 444; *Hope v. International Financial Society*, L. R. 4 Ch. Div. (Eng.) 327; *Bank v. Wickersham*, 99 Cal. 655 (1893); *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *Abeles v. Cochran*, 22 Kan. 405; *St. Louis Carriage Mfg. Co. v. Hilbert*, 24 Mo. App. 338 (1887); but see *Gill v. Balis*, 72 Mo. 424; *Taylor v. Miami Ex. Co.*, 6 Ohio 176; *Coppin v. Greenlees*, 38 Ohio St. 275, 279; *Morgan v. Lewis*, 46 Ohio St. 1, 6; *State v. Franklin Bank*, 10 Ohio 91, 97; *Hubbard v. Riley*, 3 Cin. Week. Bull. 434; *Shaw v. Ohio Edison Co.*, 19 Cin. Week. Bull. 292; *Cincinnati v. Duckworth*, 2 Ohio Cir. Ct. 518; *Cartwright v. Dickinson*, 88 Tenn. 476, 485; *Currier v. Lebanon Slate Co.*, 56 N. H. 262 (1875). In this case the court describes how a legal reduction may be made.

49 *Calteaux v. Mueller*, 102 Wis. 525; *Marvin v. Anderson*, 111 Wis. 387; *West v. Averill Grocery Co.*, 109 Iowa 488; *Iowa Lumber Co. v. Foster*, 49 Iowa 25; *Rollins v. Shaver Wagon Co.*, 80 Iowa 380; *Clapp v. Peterson*, 104 Ill. 26; *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150; *Chet-*

however cannot be done by any officer without express authority from the bank,⁵¹ or stockholders.⁵²

The capital of a national bank may be reduced to the minimum limit by a vote representing two-thirds of the shares.⁵³ The capital thus set free must be returned to the stockholders;⁵⁴ and a corresponding amount of its bonds in the possession of the government may be retired.⁵⁵ But it cannot withdraw, "either in the form of dividends or otherwise, any portion of its capital."⁵⁶

The sole exception, in which a national bank can hold or purchase its stock, is to prevent loss on a debt previously contracted

lain v. Republic Life Ins. Co., 86 Ill. 220; *City Bank v. Bruce*, 17 N. Y. 507; *Vail v. Hamilton*, 85 N. Y. 453, 457; see *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 84; *U. S. Trust Co. v. Harris*, 2 Bos. (N. Y.) 75; *Blalock v. Kernersville Mfg. Co.*, 110 N. C. 99; *Heggie v. People's B. & L. Assn.*, 107 N. C. 581; *New England Trust Co. v. Abbott*, 162 Mass. 148; *Am. Railway-Frog Co. v. Haven*, 101 Mass. 398; *Dupee v. Boston Water Power Co.*, 114 Mass. 37; *Nesmith v. Washington Bank*, 6 Pick. 324, 329; *Dock v. Schlichter Cordage Co.*, 167 Pa. 370; *Coleman v. Columbia Oil Co.*, 51 Pa. 74; *Jones v. Morrison*, 31 Minn. 140; *State v. Minn. Thresher Mfg. Co.*, 40 Minn. 227; *Cooper v. Frederick*, 9 Ala. 738; *Farmers' & Mech. Bank v. Champlain Transp. Co.*, 18 Vt. 131, 138; *Chapman v. Iron Co.*, 62 N. J. Law 497; *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418, 451; *Hartridge v. Rockwell*, R. M. Charl. (Ga.) 260; *Robison v. Beall*, 26 Ga. 17; *Price v. Pine Mountain Iron Co.*, 32 S. W. (Ky.) 267; *Jefferson v. Burford*, 17 S. W. (Ky.) 855; *Rivanna Nav. Co. v. Dawson*, 3 Gratt. (Va.) 19; *State Bank v. Fox*, 3 Blatch. (U. S.) 431; *In re Republic Ins. Co.*, 3 Biss. (U. S.) 452, 457; *First Nat. Bank v. Salem Flouring Mills Co.*, 39 Fed. 89; *Lowe v. Pioneer Threshing Co.*, 70 Fed. 646.

⁵⁰ *Gill v. Balis*, 72 Mo. 424; *Currier v. Lebanon Slate Co.*, 56 N. H. 262.

⁵¹ *Calteaux v. Mueller*, 102 Wis. 525. See *Marvin v. Anderson*, 111 Wis. 387.

⁵² *Gill v. Balis*, 72 Mo. 424; *Cartwright v. Dickinson*, 88 Tenn. 476; *Marvin v. Anderson*, 111 Wis. 387. And an attempt on the part of some of the stockholders to withdraw before all the debts of the corporation are paid, by the cancelling of their stock will be none the less void that enough remains to meet the claims of creditors. *Gill v. Balis*, 72 Mo. 424.

⁵³ Rev. Stat. §5143.

⁵⁴ *Seeley v. New York Nat. Ex. Bank*, 8 Daly (N. Y.) 400, affd. 78 N. Y. 608.

⁵⁵ Rev. Stat. §5160.

⁵⁶ Rev. Stat. §5204.

in good faith, and even then its ownership is limited to six months.⁵⁷ On several occasions this provision has been enforced, and the purchases made by a bank have been declared unlawful,⁵⁸ in others, within the law.⁵⁹ Again, even when a bank cannot lawfully purchase its stock a subsequent purchaser thereof from the bank for value acquires a good title that cannot be questioned either by itself or by its creditors.⁶⁰

The same exception applies to a State bank. This exception rests on the evident foundation that such action should be taken to preserve the solvency of the bank.⁶¹

9. Payment for Stock.

Whether stockholders have paid for their stock as the law requires must be proved in the manner provided by statute;⁶² but the presumption is that the members of a bank several years old have complied with the law.⁶³ In the early history of banking, stockholders often gave their notes for the stock received, so that banks came into being without any real capital. This led to the general requirement of paying all, or a portion, in specie. Notwithstanding this requirement, notes were often given. Generally, it may be said, the giving of a note instead of money as the law requires, is an illegality that cannot be urged by the maker, and he remains liable thereon for the benefit of the bank's creditors.⁶⁴ The national law is

57 Rev. Stat. §5201. For a construction of the statute, see *Bank v. Lanier*, 11 Wall. (U. S.) 369, 377. See Chap. VII. §17.

58 *Meyers v. Valley Nat. Bank*, 18 Nat. Bank Reg. 34; *Burrows v. Niblack*, 28 C. C. A. 130.

59 *Lee v. Citizens' Nat. Bank*, 2 Cin. Sup. Ct. Rep. (Ohio) 298.

60 *Lantry v. Wallace*, 38 C. C. A. 510; *National Bank v. Stewart*, 107 U. S. 676.

61 For cases see Chap. VII. §17.

62 *Agricultural Bank v. Burr*, 24 Me. 256.

63 *Ibid.*

64 *Pine River Bank v. Hodsdon*, 46 N. H. 114; *Lewis v. Robertson*, 13 Sm. & M. (Miss.) 558; *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398; *Pacific Trust Co. v. Dorsey*, 72 Cal. 55. "If he could evade payment of his note given for the stock shares, he might with equal propriety be permitted to deny that he became a stockholder, and thus perpetrate a fraud upon credi-

imperative in requiring payment of the entire capital in money.⁶⁵

The liability of a stockholder for payment is not fixed until the entire amount proposed for the bank has been subscribed,⁶⁶ unless this condition is expressly or implicitly waived.⁶⁷ A different rule applies to the payment of an increase. The owner must pay the agreed price, in accordance with the terms of the contract, even though the full number of shares of the proposed increase is not taken.⁶⁸

Whether money paid to a bank is for stock, or is a requested loan, is sometimes a question of fact. Nor is a letter written by one who has parted with her money, incidentally mentioning herself as a stockholder, decisive, for she may have thought, especially if possessing the ordinary woman's knowledge of business, that having lent her money to the bank she was thereby a stockholder.⁶⁹

10. Consequences of Non-payment.

(a) The national law requires fifty per cent. of the capital to be paid before beginning business, and ten per cent. of the balance monthly until the entire amount is paid.⁷⁰ By State

tors." *Atwater v. Stromberg*, 75 Minn. 277. Acceptance of a note from a subscriber is not payment for stock. It is a mere evidence of the debt incurred by the subscription and of a contract postponing payment of the indebtedness till the due date of the note. *Williams v. Brewster*, 117 Wis. 370.

65 Sec. 5140. By the law of Alabama land conveyed and accepted in payment of stock is a good consideration whether a certificate is issued therefor or not. *Frenkel v. Hudson*, 82 Ala. 158.

66 *Salem Mill-Dam Corporation v. Ropes*, 6 Pick. (Mass.) 23; *Gettysburg Nat. Bank v. Brown*, 95 Md. 367; *Hager v. Cleveland*, 36 Md. 476, 490; *Cartwright v. Dickinson*, 88 Tenn. 476; 1 Cook on Corp. §176.

67 *Hughes v. Antietam Mfg. Co.*, 34 Md. 316, 331, 332; 1 Cook on Corp. §181.

68 *Delano v. Butler*, 118 U. S. 634, 643; *Pacific Nat. Bank v. Eaton*, 141 U. S. 227; *Aspinwall v. Butler*, 133 U. S. 595; *Gettysburg Nat. Bank v. Brown*, 95 Md. 367, 386; *Avegno v. Citizens' Bank*, 40 La. Ann. 799.

69 *American Nat. Bank v. Williams*, 29 C. C. A. 203; second trial, 42 C. C. A. 101.

70 Rev. Stat. §5140.

law, requiring the full amount to be paid within a year from the time of organizing, a failure to comply with the statute may be followed by a forfeiture of the charter.⁷¹

Again, when payment for stock is a prior statutory condition of transferability, no contract for its transfer can be executed until payment has been made.⁷² The purpose of this condition is to prevent its transfer to irresponsible persons who might be unable to pay the remainder.⁷³

(b) All the states provide for the collection of subscriptions from delinquents. Nevertheless, a subscriber who has not fully paid for his stock, as required by the terms of subscription, is a stockholder.⁷⁴ He cannot question the necessity for an assessment by the directors, for it is within their province, unless circumscribed by statute, to determine when and how much of the capital subscribed shall be employed.⁷⁵ Few questions only have arisen in collecting subscriptions while banks were in a solvent condition; as they are usually fixed at no distant date after the completion of the bank's organization. Subscribers who have not paid previous to their bank's insolvency, have often resorted to every possible subterfuge to escape payment. These will be considered in the following chapter.

(c) A stockholder who is wrongfully deprived of his shares by a void assessment may either sue the bank in trover for their value, or compel it to register them, or he may sue in equity to have the sale vacated and the shares delivered up and canceled.⁷⁶

71 *People v. City Bank*, 7 Colo. 226. In New York a statute providing for the forfeiture of the delinquent's stock did not relieve him from direct liability created by his subscription. *Sagory v. Dubois*, 3 Sand. Ch. 466

72 *Merrill v. Call*, 15 Me. 428. When stock is payable in installments, sometimes a subscriber possesses no right to transfer his stock until after he has paid the first installment. *Coleman v. Spencer*, 5 Blackf. (Ind.) 197.

73 *Fitzgerald v. Union Sav. Bank*, 65 Neb. 97; *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286; *Budd v. Multnomah Street R. Co.*, 15 Or. 413.

74 *Curry v. Scott*, 54 Pa. 270.

75 *Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64.

11. Recovery by Defrauded Subscriber.

A person who has been induced by an agent of a bank to subscribe for its stock by fraudulent assertions concerning its worth, may pursue for the wrong practised on him one of several remedies. If he had paid for his stock, he can sue to recover the money; if he had not paid and is sued for the money, the fraud is a secure defence; if he affirms the contract, he can sue for the damage he has sustained.⁷⁶

His remedy must be promptly pursued after discovering the fraud.⁷⁷ He cannot wait for the plant to blossom and bear fruit before deciding whether he will keep it or not. And if he has not acted before the rights of innocent third parties have intervened he is too late, unless the fraud had not then been discovered, or a similar good reason exists for non-action.⁷⁸ For in such a case the rights of creditors to this fund are regarded as superior to those of the subscriber, even though he was wickedly entrapped.⁷⁹

Whether he can thus proceed after the bank has become insolvent has not been clearly decided. If he has not been negligent in discovering the fraud or invoking his remedy, the right, so some jurisdictions maintain, exists. In a recent Kentucky case the court declared that "an assignee stood in the

⁷⁶ *Wilson v. Hundley*, 96 Va. 96; *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Cases (Eng.) 317; *Addie v. Western Bank*, L. R. 1 Scotch & Div. App. (Eng.) 145; *In re Addlestone Linoleum Co.*, L. R. 37 Ch. Div. (Eng.) 191; *Grangers' Ins. Co. v. Turner*, 61 Ga. 561; *Upton v. Englehart*, 3 Dill. (U. S.) 496. See note, 8 Am. & Eng. Corp. Cases, (N. S.) 271. The promise of the seller of stock to the purchaser, that if it should prove worthless he would return the money, is not collateral to any obligation of the bank and therefore need not be in writing to escape the operation of the statute of frauds. *Kilbride v. Moss*, 113 Cal. 432; *Moorehouse v. Crangle*, 36 Ohio St. 130.

⁷⁷ *Ibid*; *City Bank v. Bartlett*, 71 Ga. 797; *Ashley's Case*, L. R. 9 Eq. 263, 268; *Howard v. Turner*, 155 Pa. 349; *Zang v. Adams*, 23 Colo. 408.

⁷⁸ *Bosher v. Richmond Land Co.*, 89 Va. 455, 460; *Upton v. Englehart*, 3 Dill. (U. S.) 496, 503; *Turner v. Grangers' Life & Health Ins. Co.*, 65 Ga. 649; *Deppen v. German-Am. Title Co.*, 70 S. W. (Ky.) 868, and cases cited. See cases in note, 3 Am. St. Rep. 825.

⁷⁹ Same cases, especially 65 Ga. 649.

shoes of the assignor," and as the defrauded subscriber could of course pursue the bank, he was as free to pursue its representative.⁸⁰ But the opposite rule is sustained by more authority.⁸¹ Of the two innocent parties, the defrauded stockholder or the bank's creditors, the former is regarded with less favor.

A minor rule may be added that the fraud practised on him cannot be used as a defence by a bona fide subscriber from performing his obligations.⁸²

The same principle may be applied to a director or other officer who takes advantage of his superior knowledge, by virtue of his position, to acquire the stock of a fellow member at much less than its real value. This may be done by withholding knowledge he ought to communicate to the stockholder concerning the business, earnings, and prospects of the bank, or by intentionally deceiving him about these matters. In these cases the defrauded stockholder can recover the difference between the sum received and the true worth of the stock purchased.⁸³

To render an assertion to a subscriber fraudulent, it must be one of fact, as distinguished from one of law; the assertor must know that his assertion is false and made with the intention of deceiving the subscriber. It therefore would not have this effect if the latter knew its falsity. Furthermore, it must be effective in deceiving the subscriber, and be injurious to him in order to constitute the basis of an action.⁸⁴ A false state-

80 *Mutual Investment Co. v. Schaeffer*, 85 S. W. (Ky.) 1098; *Upton v. Englehart*, 3 Dill. (U. S.) 496, 505.

81 *Howard v. Turner*, 155 Pa. 349; *Bissell v. Heath*, 98 Mich. 472; *Olson v. State Bank*, 67 Minn. 267; *Dunn v. State Bank*, 59 Minn. 221; *Wilson v. Hundley*, 96 Va. 96; *Stone v. Bank*, 3 C. P. Div. (Eng.) 282; see *Sheafe v. Larimer*, 79 Fed. 921, also cases in §6, note 6, and 1 *Cook on Corp.*, §164.

82 *Ibid.* 83 *Stewart v. Harris*, 77 Pac. (Kan.) 277; *Oliver v. Oliver*, 118 Ga. 362. See Chap. IX. §43.

84 A false statement by an officer in selling stock that none had been sold for less than par is a material representation authorizing a recession of the contract. *Hubbard v. International Mercantile Agency*, 59 At. (N. J.) 24.

ment of the law, for example, the provisions of a bank's charter, or of their legal effect, would not be actionable for the reason that the law presumes—the greatest, though most necessary, of all fictions—that everyone knows the law; that under ordinary circumstances it is always present in one's mind.⁸⁵

Lastly, as those who have been induced by the same fraudulent misrepresentations to subscribe have a common interest in obtaining redress, they may join in an action for their common relief.⁸⁶

12. Nature and Purpose of Certificate.

After paying for his stock, every stockholder receives a certificate. This, like a deed of land, is only evidence of title.⁸⁷

⁸⁵ *Upton v. Tribilcock*, 91 U. S. 45; *Clem v. Newcastle R.*, 9 Ind. 488; *Wight v. Selby R.*, 16 B. Mon. (Ky.) 4; *Vicksburg R. v. McKean*, 12 La. Ann. 638; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Walker v. Mobile R.*, 34 Miss. 245; *Selma R. v. Anderson*, 51 Miss. 829; *Oregon Central R. v. Scoggin*, 3 Or. 161; *Salem Mill-Dam Corporation v. Ropes*, 9 Pick. (Mass.) 187; *Smith v. Tallassee Plank-Road Co.*, 30 Ala. 650; *Byers v. Maxwell*, 73 S. W. (Tex. Civ. App.) 437. For other cases, see 61 Am. Dec. 401. Original incorporators who recklessly make false statements concerning the amount of capital paid cannot escape liability to creditors by transferring their stock to other parties; but subsequent purchasers in good faith are not liable. *McBryan v. Universal Elevator Co.*, 130 Mich. 111, 122.

⁸⁶ *Bosher v. Richmond Land Co.*, 89 Va. 455.

⁸⁷ *Farmers' Bank v. Diebold Safe & Lock Co.*, 66 Ohio St. 367; *Agricultural Bank v. Burr*, 24 Me. 256; *Fort Madison Lumber Co. v. Batavian Bank*, 71 Iowa 270, 274; *Sherwood v. Ill. Trust & Sav. Bank*, 195 Ill. 112; *Thompson v. Reno Sav. Bank*, 19 Nev. 103; *Cartwright v. Dickinson*, 88 Tenn. 476; *Holland v. Duluth Iron Co.*, 65 Minn. 324; *Frenkel v. Hudson*, 82 Ala. 158, 161. See §15. "A corporation, by issuing stock, declares by its certificate to the world, that the person in whose name it stands, is the holder of the number of shares which the certificate states him to be, and that it is issued with the intention that it shall be so used and acted upon, and the company is thereby liable to pay to anyone who has accepted the same, and acted thereon to his injury." *Irving, J., Metropolitan Sav. Bank v. Mayor of Baltimore*, 63 Md. 6, 8. "Stock is a share in the interests and rights of the corporation. Certificates are mere evidence. They may never be issued. It is not essential that they should be. When issued, they are merely for convenience." *Adams, C. J., Fort Madison Lumber Co. v. Batavian Bank*, 71 Iowa 270, 274.

though possessing many of the elements of negotiability.⁸⁸ He is therefore none the less an owner, even though no certificate be received.⁸⁹ One's stock or interest can be attached, but not his certificate.⁹⁰ Nevertheless while his interest cannot be transferred technically by assignment, but only through a novation, by assigning the certificate the assignor can pass the beneficial interest, and the assignee's rights are protected by law and equity as perfectly as those of the purchaser of the legal title of visible property.⁹¹ Consequently as a certificate is simply evidence of title, the gift of it to a person without his knowledge, even though the transfer be recorded, has not the effect of injecting him into the membership of the corporation.⁹²

13. Transfers.

(a) Stock may be transferred, though often not without limitations. The owner, for example, cannot transfer it on the eve of the bank's failure to a worthless holder to escape assessment.⁹³ For the same reason the owner cannot transfer it even during the unquestioned solvency of the bank and in good faith to a minor who could not respond to such a demand, or to a call for the unpaid portion had the full amount not been issued.⁹⁴ A gift therefore to a minor with a pure intention will

88 *Lyman v. State Bank*, 81 N. Y. App. Div. 367; *Buffalo German Ins. Co. v. Third Nat. Bank*, 29 N. Y. App. Div. 137, 141; *Des Moines Nat. Bank v. Warren Co. Bank*, 97 Iowa 204, 211.

89 *Frenkel v. Hudson*, 82 Ala. 158; *Farrar v. Walker*, 3 Dill. (U. S.) 506; *Pacific Trust Co. v. Coon*, 107 Cal. 447, 452; *Mitchell v. Beckman*, 64 Cal. 117, 121; *Cal. Hotel Co. v. Callender*, 94 Cal. 120, 127.

90 *Winslow v. Fletcher*, 53 Conn. 390.

91 See *Fitchburg Sav. Bank v. Torrey*, 134 Mass. 239; *Planters' & Merch. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585, 593; *Sabin v. Bank*, 21 Vt. 353; *Johnson v. Laffin*, 5 Dill. 65, 79; *Nesmith v. Washington Bank*, 6 Pick. 324; 1 *Morawetz on Private Corp.*, §174.

92 *Robinson v. Lane*, 19 Ga. 337; *Simmons v. Hill*, 96 Mo. 679; *Skowhegan Bank v. Cutler*, 49 Me. 315; *In re Imperial Mercantile Credit Assn.*, L. R. 3 Eq. (Eng.) 361. See Ch. V. §13, for more cases.

93 See Chap. V. §14.

94 *Aldrich v. Bingham*, 131 Fed. 363; *Johnson v. Laffin*, 5 Dill. 65,

not relieve the donor from liability in either of the cases above mentioned. A legal transfer can indeed be made to a person who may not be able financially to respond to a call for either purpose, "but it is essential that he shall be legally liable to assume such obligations, and not be at liberty to repudiate them." ⁹⁵

(b) A bank's authority to regulate the transfer of stock has been the subject of frequent questioning. To understand the rights of the parties several distinctions must be kept clearly in sight.

At the outset it may be remarked that a bank has a right to make any regulation it pleases with the original stockholders not opposed to its charter, the general law and public policy.⁹⁶ As no one is obliged to subscribe, his action in accepting the conditions prescribed, under which stock may be transferred are purely voluntary;⁹⁷ and therefore he may be required to hold the stock for a specified period.⁹⁸ or to offer it for sale first to the bank,⁹⁹ or suffer the bank's lien thereon to remain while he is a debtor,¹ or to permit the bank to appraise and

affd. 103 U. S. 800; *Lesassier v. Kennedy*, 36 La. Ann. p. 543; *Nickalls v. Merry*, L. R. 7 H. of L. (Eng.) 530; *Symons' Case*, 5 Ch. App. (Eng.) 298; *Weston's Case*, 5 Ch. App. 614.

⁹⁵ *Ibid*.

⁹⁶ *Jennings v. Bank of California*, 79 Cal. 323; *Williams v. Ashurst Oil Co.*, 144 Cal. 619; *Vansands v. Middlesex Co. Bank*, 26 Conn. 144. If a lawful by-law of a bank prescribes that its shares shall be transferable by endorsement in writing by the holder in presence of the cashier or two other witnesses, it must be literally executed to render the transfer valid between the parties. *Dane v. Young*, 61 Me. 160.

⁹⁷ *Ibid*.

⁹⁸ *Nesmith v. Washington Bank*, 6 Pick. (Mass.) 324, 328.

Contra.—*Williams v. Montgomery*, 68 Hun (N. Y.) 416.

⁹⁹ *Barrett v. King*, 181 Mass. 476. See *American Nat. Bank v. Oriental Mills*, 17 R. I. 551. Such an agreement among the promoters of a corporation cannot be enforced by the corporation against a violator because it is not a party thereto. *Ireland v. Globe Milling Co.*, 20 R. I. 190.

Contra.—*Brinkerhoff-Farris Trust Co., v. Home Lumber Co.*, 118 Mo. 447.

¹ *Child v. Hudson's Bay Co.*, 2 Pere Williams 207; *Vansands v. Middlesex Co. Bank*, 26 Conn. 144.

purchase it within a prescribed period after his death,² or to require the bank's approval of the assignee,³ or to fulfil other conditions.⁴

The reason for these restrictions clearly shows their justification. In the early days of corporations their projectors sought to have stockholders possessing character and pecuniary ability. As only a partial payment was usually made in the beginning for stock, it was desirable to secure members who could and would respond readily to subsequent calls.⁴ To guard against the danger of having the stock pass into feebler hands, the original stockholders were forbidden to sell during a specified period, or not until it had been offered for sale to the company. If one entered the organization understanding these regulations, what reason could justify his disregard of them? His action in entering was voluntary; he made a contract containing, so far as we can discover, no vicious or impolitic elements. The imposition of such terms on him after subscribing is quite another matter. His freedom is thereby unduly infringed, and the conditions above mentioned cannot be enforced.

It is true that the opposite rule has been established by several jurisdictions.⁵ But the reasons on which it is based are faulty. One's liberty of action is not infringed by agreeing voluntarily to conform to a clearly understood rule whenever he is not required to act at all.

2 New England Trust Co. v. Abbott, 162 Mass. 148.

3 Farmers' & Merch. Bank v. Wasson, 48 Iowa 336; Moffatt v. Farquhar, L. R. 7 Ch. Div. (Eng.) 591; Ex parte Penney, L. R. 8 Ch. App. (Eng.) 446; Chappell's Case, L. R. 6 Ch. App. (Eng.) 902; Bargate v. Shortridge, 5 H. of L. Cas. (Eng.) 297; Toole v. Middleton, 29 Beav. (Eng.) 646; Bank of Australasia v. Breillat, 6 Moore, P. C. (Eng.) 152.

4 See Nesmith v. Washington Bank, 6 Pick. (Mass.) 324; New England Trust Co. v. Abbott, 162 Mass. 148; Farmers' & Merch. Bank v. Wasson, 48 Iowa 336, 339.

5 Bloede Co. v. Bloede, 84 Md. 129, 142; McNulta v. Corn Belt Bank, 164 Ill. 427; Chouteau Spring Co. v. Harris, 20 Mo. 382; Moore v. Bank, 52 Mo. 377; Brinkerhoff-Farris Trust Co. v. Home Lumber Co., 118 Mo. 447.

14. Unrecorded Transfers Between Immediate Parties.

While the registration of stock may be regulated by charter, statute, by-law and agreement, as between the immediate parties a complete title may be acquired, except that of voting at elections, by a delivery, properly assigned, of the certificate.⁶

6 *Planters' & Merch. Co. v. Selma Sav. Bank*, 63 Ala. 585; *Fisher v. Jones*, 82 Ala. 117; *Duke v. Cahawba Nav. Co.*, 10 Ala. 82; *Parrott v. Byers*, 40 Cal. 614; *Mead v. Elmore*, 35 Cal. 653; *Colt v. Ives*, 31 Conn. 25; *Bates-Farley Sav. Bank v. Dismukes*, 107 Ga. 212, 220; *Aulbach v. Dahler*, 4 Idaho 654; *People's Bank v. Gridley*, 91 Ill. 457; *Otis v. Gardner*, 105 Ill. 436; *Kellogg v. Stockwell*, 75 Ill. 68; *Bruce v. Smith*, 44 Ind. 1; *Farmers' Bank v. Wasson*, 48 Iowa 336; *Bank v. McNeil*, 10 Bush (Ky.) 54; *Thurber v. Crump*, 86 Ky. 408; *Bloede Co. v. Bloede*, 84 Md. 129; *Nesmith v. Washington Bank*, 6 Pick. (Mass.) 324; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; *Brown v. Smith*, 122 Mass. 589; *Dickinson v. Central Nat. Bank*, 129 Mass. 279; *Fitchburg Sav. Bank v. Torrey*, 134 Mass. 239; *Baldwin v. Canfield*, 26 Minn. 43; *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *Wilson v. St. Louis R.*, 108 Mo. 588; *Leyson v. Davis*, 17 Mont. 220, affd. 170 U. S. 36; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Hunterdon Co. Bank v. Nassau Bank*, 17 N. J. Eq. 496; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 331; *Bank of Attica v. Manuf. & Traders' Bank*, 20 N. Y. 501; *Robinson v. Bank*, 95 N. Y. 637; *Orr v. Bigelow*, 14 N. Y. 556; *Adderly v. Storm*, 6 Hill (N. Y.) 624, 628; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770; *Johnson v. Underhill*, 52 N. Y. 203; *Isham v. Buckingham*, 49 N. Y. 216, 222; *Mahaney v. Walsh*, 16 N. Y. App. 601; *Conant v. Reed*, 1 Ohio St. 298; *Bank of Commerce's Appeal*, 73 Pa. 59; *Presbyterian Congregation v. Carlisle Bank*, 5 Pa. 345, 350; *Bank v. Schuylkill Bank*, 1 Par. Eq. Cases (Pa.) 180, 247; *Hoppin v. Buffum*, 9 R. I. 513; *American Nat. Bank v. Oriental Mills*, 17 R. I. 551, 557, 558; *Maxwell v. Foster*, 67 S. C. 376; *State Bank v. Cox*, 11 Rich. Eq. (S. C.) 344; *Cornik v. Richards*, 3 Lea (Tenn.) 1; *American Nat. Bank v. Nashville Elevator Co.*, 36 S. W. (Tenn. Ch. App.) 960; *Application of Murphy*, 51 Wis. 519; *National Bank v. Watsonstown Bank*, 105 U. S. 217; *Johnston v. Laflin*, 103 U. S. 800, 804; *Union Bank v. Laird*, 2 Wheat. (U. S.) 390; *Black v. Zacharie*, 3 How. (U. S.) 483, 513; *United States v. Cutts*, 1 Sum. (U. S.) 133, 148; *Masury v. Arkansas Nat. Bank*, 35 C. C. A. 476; *Scott v. Pequonnock Nat. Bank*, 15 Fed. 494; *Bank v. Bank*, 11 C. C. A. 484, 486; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369. In one of the latest cases the court said: "It seems too clear for argument that the ownership of shares passes from the seller to the buyer by force of the contract of sale, and not by operation of law; and, if that be so, the buyer's title so far as the seller is concerned,

And the same rule applies to the transfer of national bank stock.⁷ Formerly, a stricter view was taken, and an unrecorded transfer was less effective, even between the immediate parties.⁸

That the owner of stock may sell and transfer by assignment and delivery of the certificate to the purchaser, who may acquire a good title thereto without having a record made of the transfer on the books, is a principle having the widest application.⁹ Nothing is more frequently seen than transfers of certificates in blank, signed by the vendor,¹⁰ floating around as if registration were unknown. Of course a purchaser who knows that the stock has been lawfully pledged acquires no title by the transfer of a certificate thus endorsed.¹¹

attaches the moment this contract is fully consummated between them." *Westminster Nat. Bank v. N. E. Electrical Works*, 62 At. (N. H.) 971, quoting from *Scripture v. Soapstone Co.*, 50 N. H. 571, 585; *Meredith Village Sav. Bank v. Marshall*, 68 N. H. 417.

A stockholder passes his interest although the transfer is not in conformity with the rules of the company; *Gilbert v. Manchester Iron Co.*, 11 Wend. (N. Y.) 627.

7 *Johnston v. Laflin*, 103 U. S. 800, 803, affg. 5 Dill. (U. S.) 65, containing an elaborate opinion; *Doty v. First Nat. Bank*, 3 N. Dak. 9.

8 *Weston v. Bear River Co.*, 5 Cal. 186; *Marine Bank v. Biays*, 4 Har. & J. (Md.) 338; *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Northrop v. Newtown & Bridgeport Co.*, 3 Conn. 544; *Northrop v. Curtis*, 5 Conn. 246; *Oxford Turnpike Co. v. Bunnel*, 6 Conn. 552; *Vansands v. Middlesex Co. Bank*, 26 Conn. 144, 153; but see §13, note 94. See also *Pittsburgh R. Co. v. Clarke*, 29 Pa. 146, 151; *Helm v. Swiggett*, 12 Ind. 194; *Koons v. First Nat. Bank*, 89 Ind. 178, 183; *State v. First Nat. Bank*, 89 Ind. 302; *Coleman v. Spencer*, 5 Blackf. (Ind.) 197; *Dane v. Young*, 61 Me. 160.

9 *Johnson v. Hume*, 138 Ala. 564; *Winter v. Montgomery Gas-light Co.*, 89 Ala. 544, 548; *Campbell v. Woodstock Iron Co.*, 83 Ala. 351; *Rough v. Breitung*, 117 Mich. 48; *American Nat. Bank v. Nashville Warehouse Co.*, 36 S. W. (Tenn. Ch. App.) 960; *Smith v. Railroad*, 91 Tenn. 221. For transfers between husband and wife, see *Johnson v. Hume*, 138 Ala. 564; *Rice v. McReynolds*, 8 Lea (Tenn.) 36; *Handwerker v. Dieremyer*, 96 Tenn. 619; *Slaymaker v. Bank*, 10 Pa. 373.

10 *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Union & Planters' Bank, v. Farrington*, 13 Lea (Tenn.) 333; *Shattuck v. American Cement Co.*, 205 Pa. 197; 2 Cook on Corp. §380.

11 *New Jersey Trust Co. v. Bodine*, 60 At. 387; 69 N. J. Eq.—

Recording is a statutory requirement established solely for the bank and its stockholders, and not for the stockholders themselves.¹² To some extent the purpose is similar to that of recording the sales of real estate. It is to give notice of the title to creditors, and purchasers, prevent fraudulent transfers, protect the bank in determining questions of membership, the right to vote, the payment of dividends, the assessment of members, and other incidents of ownership.¹³

Questions are constantly arising, what is a compliance with the statutory requirement, affording protection to the purchaser and to the bank. On this matter, much depends on the form of the statute, and of the by-laws. A substantial compliance with their terms will suffice, and when the registration is made in good faith,—and a bank rarely has occasion to act otherwise,—the courts seek to uphold its action, though in making the record it may not have books for the express purpose, or have made entries therein in the most exact manner.¹⁴

The courts have not always been precise in declaring the extent of the interest thus transferred. The older cases generally declare that the equitable title¹⁵ only passes; later cases,

12 Doty v. First Nat. Bank, 3 N. Dak. 9.

13 Fisher v. Jones, 82 Ala. 117, 122; Planters' & Merch. Ins. Co. v. Selma Sav. Bank, 63 Ala. 585; Jones v. Latham, 70 Ala. 164; Black v. Zacharie, 3 How. (U. S.) 483, 527; Scripture v. Francetown Soapstone Co., 50 N. H. 571; Cheever v. Meyer, 52 Vt. 66; American Nat. Bank v. Nashville Warehouse Co., 36 S. W. (Tenn. Ch. App.) 960; Cornick v. Richards, 3 Lea. (Tenn.) 1; Union & Planters' Bank v. Farrington, 13 Lea. (Tenn.) 333; West Nashville Planing Co. v. Nashville Sav. Bank, 86 Tenn. 252.

14 Fisher v. Jones, 82 Ala. 117. In this case the court said: "A written memorandum in the proper form would as well answer the purposes thus intended, as a formal record. There may, moreover, be verbal transfers of stock certificates, accompanied by delivery, and creating equitable liens, intended only for brief collateral securities, which would not be susceptible of being registered in this mode, and are not capable of being recorded in a formal sense."

15 Conant v. Reed, 1 Ohio St. 298; Gemmell v. Davis, 75 Md. 546; Bloede Co. v. Bloede, 8 Md. 129, 141; American Nat. Bank v. Oriental Mills, 17 R. I. 551.

"the entire title,"¹⁶ "the complete title,"¹⁷ "the legal or equitable title,"¹⁸ "the legal and equitable title."¹⁹ Such a transfer is not complete in every sense. Without the surrender of the certificate to the bank, the issue, recording, and delivery of the new one to the transferee, as the by-laws usually prescribe, the transfer is not perfected between the vendor and vendee and the bank. And as the transfer is not complete between these parties and the bank until all these things are done, some courts still regard a transfer between the vendor and vendee as passing only an equitable title; they do not entirely disassociate the two aspects of the transaction. But whenever the act of the vendor is regarded as complete in itself, a legal title is acquired.

15. Unrecorded Transfer Between Other Parties.

If a transfer is unrecorded, different effects may arise (a) between the assignor and the bank; (b) between him and a second purchaser from the vendor; (c) between him and his creditors; and also (d) between the assignee and the bank;

16 *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 331.

17 *Johnson v. Laffin*, 5 Dill. (U. S.) 65, 79.

18 *Johnston v. Laffin*, 103 U. S. 800, 804.

19 *Meredith Village Sav. Bank v. Marshall*, 68 N. H. 417.

"When the stock of a corporation is by the terms of its charter or by-laws transferable only on its books, the purchaser who receives a certificate with power of attorney gets the entire title legal and equitable, as between himself and his seller, with all the rights the latter possessed." *Davis, J., New York & New Haven R. v. Schuyler*, 34 N. Y. 30, 80. In Louisiana the pledge of shares of the capital stock of a corporation is perfect by the delivery of the certificate, whatever its by-laws may provide to the contrary. *Pitot v. Johnson*, 33 La. Ann. 1286; *N. O. Nat. Bkg. Assn. v. Wiltz*, 4 Woods (U. S.) 43.

"Where the legal and equitable titles unite in the same persons . . . such a transfer carries at least the equitable title, even when by statute, charter or by-law the stock is declared to be transferable only on the corporation books." *Beckwith v. Burrough*, 13 R. I. 294, 298. If the legal title is in one person and the equitable in another, the effect of a transfer might be that "the equitable title would not always pass; as, for instance, if the transfer were made by the legal owner to pay a debt of his without the consent of the equitable owner." *Ibid*.

and (e) between him and his creditors. Only the first three points will be here considered.

(a) The lien or other interest of the bank in the stock as creditor of the assignor is not affected by an unrecorded transfer, unless a statute has established a different rule.²⁰

(b) Should the original assignor make a second sale to one who knew nothing about the first, he would acquire a better title.²¹ But when the delay in recording the first transfer is not traceable in any way to the inaction or neglect of the first purchaser, the above rule can not be justly invoked against him.²²

(c) Whether other creditors of the assignor may attach and acquire the stock as his property, unless a statute protects the unrecorded title of the assignee, is not everywhere admitted;²³ though the superior right of a bona fide pledgee or assignee to an attaching creditor or his vendee steadily commands increasing judicial²⁴ and legislative recognition.²⁵

20 *Union Bank v. Laird*, 2 Wheat. (U. S.) 390; *Brent v. Bank*, 10 Pet. (U. S.) 596; *Farmers' Bank v. Iglehart*, 6 Gill. (Md.) 50; *Reese v. Bank*, 14 Md. 271; *Sabin v. Bank*, 21 Vt. 353; *Rogers v. Huntingdon Bank*, 12 Serg. & R. (Pa.) 77. See *Bank of Commerce's Appeal*, 73 Pa. 59, and *Conant v. Reed*, 1 Ohio St. 298.

21 *Parrott v. Byers*, 40 Cal. 614; *Mead v. Elmore*, 35 Cal. 653.

22 *Beckwith v. Burrough*, 13 R. I. 294.

23 See 2 *Cook on Corp.* §486-488.

24 *Robinson v. New Berne Nat. Bank*, 95 N. Y. 637; *Sims v. Bonner*, 16 N. Y. Sup. 801; *Eby v. Guest*, 94 Pa. 160; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24, *affd.* 17 N. J. Eq. 496; *May v. Cleland*, 117 Mich. 45; *Haslam v. First Nat. Bank*, 79 Minn. 1; *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454; *Allen v. Stewart*, 7 Del. Ch. 287; *Trimble v. Vandegrift*, 7 Houst. (Del.) 451; *Farmers' & Merch. Bank v. Mosher*, 63 Neb. 130; *Clark v. German Security Bank*, 61 Miss. 611; *Seeligson v. Brown*, 61 Tex. 114; *Mapleton Bank v. Standrod*, 8 Idaho 740; *Cheever v. Meyer*, 52 Vt. 66; *Doty v. First Nat. Bank*, 3 N. Dak. 9; *Sibley v. Quinsigamond Nat. Bank*, 133 Mass. 515; *Thurber v. Crump*, 86 Ky. 408; *Pitot v. Johnson*, 33 La. Ann. 1286.

Contra.—*Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600; *Fort Madison Lumber Co. v. Batavian Bank*, 71 Iowa, 270; *Colt v. Ives*, 31 Conn. 25. See valuable note 67 L. R. A. 656.

25 Illinois—*Laws*, 1883, p. 110, superseding *People's Bank v. Gridley*, 91 Ill. 457; *Rice v. Gilbert*, 173 Ill. 348. Maine.—*Laws*, 1897, Ch. 293, super-

One may wonder why there should have been so much difficulty to establish the modern rule, since the true object of recording stock is for the benefit of the bank and its members, and not for the benefit of outsiders. To this end the record is open only to stockholders and not to their creditors, consequently the latter have no right to use any information they may obtain from this record to overthrow the bona fide transactions of the members with the bank or with each other.²⁶

The rule doubtless is universal that when stock is not registered by the bank at the purchaser's request, a subsequent attaching creditor of the assignor cannot acquire any interest by his proceeding.²⁷

16. Effect of Demanding Assessments.

Concerning the assessment of stock that has changed ownership without a change of the record, serious questions arise. These will be considered hereafter.

17. Responsibility of Bank in Making Transfers.

A bank is responsible for transferring stock without due authority from the transferer.²⁸ A transfer without a certi-

seding *Skowhegan Bank v. Cutler*, 49 Me. 315. Maryland.—Laws, 1886, Ch. 287. Massachusetts.—Laws, 1884, Ch. 229, superseding *Fisher v. Essex Bank*, 5 Gray 373. New Hampshire.—Laws, 1887, Ch. 16, superseding *Buttrick v. Nashua R.*, 62 N. H. 413. Rhode Island.—Laws, 1888, Ch. 690. Virginia.—Code, 1887, Sec. 1133. West Va.—Code, 1887, Ch. 53, Sec. 37. Wisconsin.—Annotated Statutes, Ch. 85, §1751, superseding *In re Murphy*, 51 Wis. 519. Wyoming.—Rev. Stat. §2779.

²⁶ *Thurber v. Crump*, 86 Ky. 408, 419, 420; *Mapleton Bank v. Standrod*, 8 Idaho 740, 747. For the opposing view that the record is open to outsiders and therefore notice to all, see the well considered case of *Fort Madison Lumber Co. v. Batavian Bank*, 71 Iowa 270.

²⁷ *Merchants' Nat. Bank v. Richards*, 74 Mo. 77, affg. 6 Mo. App. 454; *Colt v. Ives*, 31 Conn. 25; *Plymouth Bank v. Bank of Norfolk*, 10 Pick. (Mass.) 454.

²⁸ *Bayard v. Farmers' & Mech. Bank*, 52 Pa. 232; *Lowry v. Commercial & Farmers' Bank*, Taney (U. S.) 310; *Machinists' Nat. Bank v. Field*, 126 Mass. 345; *Loring v. Salisbury Mills*, 125 Mas. 138; *Peck v. Bank*, 16 R. I. 710; *Telegraph Co. v. Davenport*, 97 U. S. 369, 373. "Corporations are the custodians of the evidence of title to their stock, and for that rea-

ficate is made at its peril, and the bank is still liable to the real owner who holds the certificate.²⁹ A bank should fully assure itself of the authority of an agent, executor, or other trustee who desires a transfer, before complying with his request.³⁰

son are held to the exercise of reasonable care and diligence in its preservation. They are bound to acquire, and are entitled to, the production of satisfactory evidence of the authority of the person who proposes to make the transfer. But when they have notice of the want of authority, or being put upon inquiry, fail to make the proper investigation, they become responsible for allowing an unauthorized transfer to be made." Page, J., *Hughes v. Drovers' & Mech. Nat. Bank*, 86 Md. 418, 423; citing *Peck v. Bank*, 16 R. I. 710; *Bayard v. Farmers' & Mech. Bank*, 52 Pa. 232, and other cases.

A testator bequeathed to his married daughter bank stock, "all of which was to be transferred to her in her own name to use the interest thereof as long as she may live, and at her death to be equally divided among her children, unless she becomes a widow, then she is to have full control of this bequest to do with it as she pleases." By order of the proper court the stock was transferred to her absolutely, which she sold from time to time, and used the proceeds. A trustee who was appointed to take charge of her estate filed a bill against the bank for transferring to her the stock. It was not sustained, for the testator intended to commit the property to her hands with plenary powers to sell it. *Hughes v. Drovers' & Mech. Nat. Bank*, 86 Md. 418.

An executor who was also a director of a bank, without authority by will or order of court, sold the testator's stock in the bank at private sale, taking a note therefor and keeping the money paid by the purchasers. In an action by a subsequent executor against the bank to set aside the sale, or be paid the value of the stock, the court held that the transfer passed no title to the purchaser, that both he and the bank knew, or ought to have known, that the executor had no authority for thus acting. *Weyer v. Second Nat. Bank*, 57 Ind. 198.

A presented a certificate of city stock for \$18,400 as collateral to a bank, therein requesting a \$3,500 loan. The stock stood in the name of B, a minor, whose endorsement was forged. A requested another loan of \$6,000, which was done on the bank's demand for a new certificate in its name covering both loans. In an action between the bank and the city, it was held (a) that to the extent of the advances actually made before the issuing of the ten thousand dollar certificate, the city was not responsible for the bank's negligence; (b) that the city was negligent in not requiring proof that the transfer was genuine before cancelling the old and issuing the new certificate; (c) that the city was answerable for the subsequent advances made on the new certificate; (d) that the surrender of the first note by the bank and the taking of the second, did not make the first loan a new one, and the bank could not thereby escape the consequences of its orig-

The power of attorney or other instrument must be genuine,³¹ and executed by a person of legal capacity.³² If a long period has passed since the trustee's appointment, the bank should look with still greater care into his authority.³³ And if the will or other instrument under which he acts prescribes the mode of making the sale or transfer, the bank should require strict compliance.³⁴ But a bank that has fulfilled its duty in this regard is not responsible for the use made of the stock afterward.³⁵

18. Official Tampering With Certificate.

Of course a transfer officer ought not to tamper with a certificate given to him for record. Yet on one occasion the cashier of a bank inserted his own name in the blank as assignee

inal negligence. *Metropolitan Sav. Bank v. Mayor of Baltimore*, 63 Md. 6; and *Mayor of Baltimore v. Ketchum*, 57 Md. 23. An administrator who in good faith and for good reasons postpones the sale of bank stock will not be liable for a loss to the estate resulting from the subsequent depreciation caused by events which he could neither foresee nor control. *Pearson v. Gillenwaters*, 99 Tenn. 446.

29 *Pollock v. National Bank*, 7 N. Y. 274; *Cohen v. Gwynn*, 4 Md. Ch. 357; *Sewall v. Boston Water Power Co.*, 4 Allen (Mass.) 277; *Davis v. Bank*, 2 Bing. (Eng.) 393; *In re Bahia Railway Co.*, L. R. 3 Q. B. (Eng.) 584; *Donaldson v. Gillot*, L. R. 3 Eq. Cases (Eng.) 274.

30 *Bayard v. Farmers' & Mech. Bank*, 52 Pa. 232. See *London Bank v. Aronstein*, 54 C. C. A. 663.

31 *Chew v. Bank*, 14 Md. 299; *Brown v. Howard Fire Ins. Co.*, 42 Md. 384; *Pratt v. Boston & Albany R.*, 126 Mass. 443; *Machinists' Nat. Bank v. Field*, 126 Mass. 345; *Pollock v. National Bank*, 7 N. Y. 274; *Telegraph Co. v. Davenport*, 97 U. S. 369. For other cases see note on this case 373.

32 *Chew v. Bank*, 14 Md. 299.

33 *Peck v. Bank*, 16 R. I. 710, 714; *Marbury v. Ehlen*, 72 Md. 206.

34 *Weyer v. Second Nat. Bank*, 57 Ind. 198; *Cox v. First Nat. Bank*, 119 N. C. 302; *Wooten v. Railroad*, 128 N. C. 119; *Lowry v. Commercial & Farmers' Bank*, Taney (U. S.) 310; *Hughes v. Drovers' & Mech. Nat. Bank*, 86 Md. 418; *Magwood v. Railroad Bank*, 5 S. C. 379; *Farmers' & Mech. Bank v. Wayman*, 5 Gill (Md.) 336; *Bohlen's Estate*, 75 Pa. 304. If stock is registered by mistake in the name of one of several beneficiaries, the bank is liable for permitting that one to transfer the whole. *Farmers' & Mech. Bank v. Wayman*, 5 Gill (Md.) 336.

35 *Bank v. Craig*, 6 Leigh (Va.) 399; *Hughes v. Drovers' & Mech. Nat. Bank*, 86 Md. 418.

and increased the number of shares. The court on the application of the true owner corrected the certificate and the record.³⁶

19. Remedy for Refusal to Transfer.

On many occasions banks have refused to make transfers, sometimes because the requestor's authority was lacking, at other times because claimants were conflicting; more frequently because the bank claimed an interest in, or lien on the stock itself. In such cases the true owner can compel the bank to transfer the stock or recover the value of it.³⁷ Of course, he must prove his ownership.³⁸

³⁶ *Koons v. First Nat. Bank*, 89 Ind. 178.

³⁷ *Johnston v. Laffin*, 103 U. S. 800, 804; *Webster v. Upton*, 91 U. S. 65; *Bank v. Lanier*, 11 Wall. (U. S.) 309; *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299; *Hill v. Rockingham Bank*, 44 N. H. 567; *Westminster Nat. Bank v. N. E. Electrical Works*, 62 At. (N. H.) 971; *Dayton Nat. Bank v. Merchants' Nat. Bank*, 37 Ohio St. 208; *Sibley v. Quinsigamond Nat. Bank*, 133 Mass. 515; *Hussey v. Manufacturers' & Mech. Bank*, 10 Pick. (Mass.) 415; *Gray v. Portland Bank*, 3 Mass. 364; *Bank v. Smalley*, 2 Cow. (N. Y.) 770; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348; *Shipley v. Mechanics' Bank*, 10 Johns. (N. Y.) 484; *Bank v. Manufacturers & Traders' Bank*, 20 N. Y. 501; *Robinson v. National Bank*, 95 N. Y. 637; *Purchase v. New York Ex. Bank*, 3 Rob. (N. Y.) 164; *Byrne v. Union Bank*, 9 Rob. (La.) 433; *Feckheimer v. National Ex. Bank*, 79 Va. 80; *Presbyterian Congregation v. Carlisle Bank*, 5 Pa. 345; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149, 155; *Helm v. Swiggett*, 12 Ind. 194.

The measure of damages is the value of the stock or its highest market price at any time after the demand and refusal to permit a transfer to the owner. *Arnold v. Suffolk Bank*, 27 Barb. (N. Y.) 424. It is only to the extent that loss has actually been incurred through misrepresentation made by the certificate that it will be made good. *Metropolitan Sav. Bank v. Mayor*, 63 Md. 6, 9. Stock is transferable only at the bank. *Williams v. Mechanics' Bank*, 5 Blatch. (U. S.) 59. And if transferred elsewhere, it may be attached as the stock of the former owner. *Ibid.* A power of attorney given by the owner of stock to one of two assignees authorizing him to make the transfer is valid. *Plymouth Bank v. Bank*, 10 Pick. (Mass.) 454. The transferee may assert his right in a court of another state than that which created the corporation. *Westminster Nat. Bank v. N. E. Electrical Works*, 62 At. (N. H.) 971.

³⁸ *Shipley v. Mechanics' Bank*, 10 Johns. (N. Y.) 484; *Bank v. Harrison*, 66 Ga. 696; *King v. Bank of England*, Doug. 524; *Birmingham Fire*

To this rule there is an important limitation. A mandamus will not lie to compel the transfer of the stock when it does not appear to possess any peculiar value over other stock, and the remedy to recover its value is adequate and complete.³⁹

A public officer who has sold bank stock on execution may invoke the aid of the court to compel the officers of the institution to give him access to the books for the purpose of making the transfer.⁴⁰

In cases of refusal to transfer, the assignor's indebtedness to the bank may be a good defence, if it has a lien thereon, but illegality of consideration paid by the assignee does not justify the bank's inaction.⁴¹

20. Statutory Requirements Concerning Transfer.

A statutory requirement concerning transfers must be regarded.⁴² Thus a statute providing that no assignment of a bank's stock shall be valid unless formally transferred on the books, must be heeded, and the bank must regard the owner of record as the true owner until notice is received of its assignment to a third person. After this, the bank must regard the transaction as an equitable transfer, although no legal or formal transfer has been made.⁴³ An important consequence flows from this distinction between legal and equitable ownership. As long as a bank has no notice of any transfer, though it may have been made, it can lend to the assignor and hold his stock as security, but after receiving notice of the transfer,

Ins. Co. v. Commonwealth, 92 Pa. 72 and cases cited; *Plymouth Bank v. Bank*, 10 Pick. (Mass.) 454, 458; *Dunn v. Commercial Bank*, 11 Barb. (N. Y.) 580; *High's Ex. Legal Rem.*, §313.

³⁹ *State v. Rombauer*, 46 Mo. 155. See *Helm v. Swiggett*, 12 Ind. 194, and *Purchase v. New York Ex. Bank*, 3 Rob. (N. Y.) 164.

⁴⁰ *State v. First Nat. Bank*, 89 Ind. 302; *Bailey v. Strohecker*, 38 Ga. 259; *Rex v. Worcester Canal Co.*, 1 Man. & R. (Eng.) 529.

⁴¹ *Helm v. Swiggett*, 12 Ind. 194.

⁴² A statute prescribing the mode of transferring is no authority for prohibiting or abridging a transfer. *Driscoll v. West Bradley Mfg. Co.*, 59 N. Y. 96.

⁴³ *People's Bank v. Exchange Bank*, 116 Ga. 820.

it can no longer extend credit to the assignor relying on his stock for protection.⁴⁴ Its lien however would cover a new loan contracted by the equitable owner.⁴⁵

Again, a national bank that is in voluntary liquidation is not thereafter required to register a subsequent transfer of its stock and issue new stock to the transferee.⁴⁶

21. Effect of Transfer on Books Without Surrendering Certificate.

Very generally the by-law regulating transfers provides that shares shall be transferable on the surrender of the certificate properly endorsed. Suppose the transfer is made on the books, but the certificate is not surrendered. As between the immediate parties there is a valid sale; and also between the bank and a purchaser; consequently it would have a lien on his stock, wherever lien laws prevail, for future indebtedness; while another bank to which the certificate might be pledged after the transfer for a loan would be without security.⁴⁷

22. Other Modes of Acquiring Equitable Title.

Though the legal title to stock can be acquired only in the manner prescribed, except by legal proceedings, an individual may acquire an equitable title in other ways.⁴⁸ Thus a partnership owning stock in a bank dissolves, the retiring partner selling out his interest to the others, who assume the debts and continue the business under a new name. The successor becomes the equitable owner of the stock.⁴⁹

44 *Birmingham Trust & Sav. Co. v. La. Nat. Bank*, 99 Ala. 379; *Guarantee Co. v. East Rome Town Co.*, 96 Ga. 511.

45 *Planters & Merchants' Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585.

46 *Rev. Stat. §5220*; *Muir v. Citizens' Nat. Bank*, 39 Wash. 57.

47 *Bank of Commerce v. Bank of Newport*, 11 C. C. A. 484; *Upton v. Burnham*, 3 Biss. (U. S.) 431; *First Nat. Bank v. Gifford*, 47 Iowa 575.

48 *Black v. Zacharie*, 3 How. (U. S.) 483; *Duke v. Cahawba Nav. Co.*, 10 Ala. 82.

49 *Planters & Merchants' Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585. In the above case the court remarks that the equitable transferee could "demand that he be invested with the legal title."

23. Lien.

At common law, a bank has no lien on its stock for the owner's indebtedness;⁵⁰ but in many States a lien has been imposed by specific statute or charter.⁵¹ And wherever the right exists, the lien is not destroyed by violating the law restricting the amount that may be loaned to a borrower, except for the excess.⁵² In no case can the lien operate retrospectively.⁵³

Once, a bank could establish a lien by usage;⁵⁴ or by by-law under the general authority given to a bank to regulate the mode of transferring its stock,⁵⁵ and in some States⁵⁶ this is

50 *People v. Crockett*, 9 Cal. 112; *Nesmith v. Washington Bank*, 6 Pick (Mass.) 324; *Merchants' Bank v. Shouse*, 102 Pa. 488; *Farmers' & Merch. Bank v. Wasson*, 48 Iowa, 336; *Dempster Mfg. Co. v. Downs*, 126 Iowa, 80, 82; *Boyd v. Redd*, 20 N. C. 335; *Fitzhugh v. Bank*, 3 T. B. Mon. (Ky.) 126; *Vansands v. Middlesex Co. Bank*, 26 Conn. 144; *Bank v. Pinson*, 58 Miss. 421, 435; *Bank v. Durfee*, 118 Mo. 431; *Heart v. State Bank*, 2 Dev. Eq. (N. C.) 111; *Driscoll v. West Bradley Mfg. Co.*, 59 N. Y. 96, 102; *Lyman v. State Bank*, 81 N. Y. App. Div. 367, *affd.* 179 N. Y. 577. See extensive note in 10 Am. & Eng. Corp. Cases (N. S.) 192.

51 *National Bank v. Watsontown Bank*, 105 U. S. 217; *Union Bank v. Laird*, 2 Wheat. (U. S.) 390; *Mechanics' Bank v. Seaton*, 1 Pet. (U. S.) 299; *Cross v. Phenix Bank*, 1 R. I. 39; *Owens v. Atlanta Trust & Bkg. Co.*, 122 Ga. 521; *Sabin v. Bank*, 21 Vt. 353; *Kenton Ins. Co. v. Bowman*, 84 Ky. 430; *Dempster Mfg. Co. v. Downs*, 126 Iowa, 80; *Bradford Bkg. Co. v. Briggs*, L. R. 31. Ch. Div. (Eng.) 19. The law will not sustain any act of a bank to use its charter lien to favor a particular customer to the injury of others. *Bank v. Bonnie*, 102 Ky. 343, 351.

52 *People's Bank v. Exchange Bank*, 116 Ga. 820.

53 *People v. Crockett*, 9 Cal. 112; *Bryon v. Carter*, 22 La. Ann. 98.

54 *Morgan v. Bank*, 8 Serg. & R. (Pa.) 73; *Vansands v. Middlesex Co. Bank*, 26 Conn. 144, 155.

55 *M'Dowell v. Bank*, 1 Harr. (Del.) 27; *Morgan v. Bank*, 8 Serg. & R. (Pa.) 73; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; *Vansands v. Middlesex Co. Bank*, 26 Conn. 144; *Brent v. Bank*, 10 Pet. (U. S.) 596, 615; *Bank v. Pinson*, 58 Miss. 421; *Child v. Hudson's Bay Co.*, 2 Peere Williams (Eng.) 207. The owner of forty shares of stock bequeathed them to his four sons. Thirty shares were transferred to three of them. The bank refused to transfer the other ten, holding them for a debt, not due by the fourth son, but by two of the others. This could not be done. *Presbyterian Congregation v. Carlisle Bank*, 5 Pa. 345.

56 *People v. Crockett*, 9 Cal. 112; *Bank v. Pinson*, 58 Minn. 421; *Lock-*

still the law. But the current of decision is now running so strongly against secret liens, the right to fasten a lien on stock by by-law is denied unless authority is clearly conferred by statute.⁵⁷ This tendency is doubtless strengthened by the Federal prohibition,⁵⁸ adopted also by some of the States. Says Justice Folger: "It is not a reasonable by-law, which, without authority express, or to be clearly implied, interferes with the common rights of property and the dealings of third persons, and prevents the purchase and transfer or delivery of property."⁵⁹

Again, in a State not opposed to the creation of liens by usage or by-law, but where neither statute nor bank by-law imposing them exists, the acceptance of a stock certificate declaring that the bank has a lien on the stock for the owner's indebtedness is equivalent to an agreement establishing an "equitable lien."⁶⁰ Consequently, should the owner sell his stock, and the purchaser request its transfer, the bank could enforce its lien before complying with his wishes. On the

wood v. Mechanics' Nat. Bank, 9 R. I. 308; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513; Planters' Ins. Co. v. Selma Sav. Bank, 63 Ala. 585; McDowell v. Bank, 1 Harr. (Del.) 27; Pendergast v. Bank, 2 Saw. (U. S.) 108.

⁵⁷ Driscoll v. West Bradley Mfg. Co., 59 N. Y. 96; Merchants' Bank v. Shouse, 102 Pa. 488. The disfavor with which the law regards secret liens does not apply to the bank and its members. Costello v. Portsmouth Brewing Co., 43 At. (N. H.) 640.

⁵⁸ Rev. Stat. §5201; Bank v. Lanier, 11 Wall. (U. S.) 369; Bulard v. Bank, 18 Wall. 589; State v. First Nat. Bank, 89 Ind. 302, 310; Smith v. First Nat. Bank, 115 Ga. 608. See Chap. III. §8, notes 48, 52 for more cases.

⁵⁹ Driscoll v. West Bradley Mfg. Co., 59 N. Y. 96, 102; Mechanics & Farmers' Bank v. Smith, 19 Johns, (N. Y.) 115. Though a bank is forbidden to make any loan on the pledge of its own stock, this does not prevent a bank from claiming a lien thereon for indebtedness. Vansands v. Middlesex Co. Bank, 26 Conn. 144.

⁶⁰ Jennings v. Bank of California, 79 Cal. 323; Vansands v. Middlesex Co. Bank, 26 Conn. 144. See Chap. III. §9.

Time and course of dealing may ratify such a restriction in a certificate. Reynolds v. Bank of Mt. Vernon, 6 N. Y. App. Div. 62; Kent v. Quicksilver Mining Co., 78 N. Y. 159.

other hand, a bank that issues a certificate stating that it is transferable has no lien thereon for the owner's indebtedness.⁶¹ Such a certificate "must be taken as conclusive evidence against the bank that the stock is salable and free of incumbrance."⁶²

24. What Language Creates a Lien.

What language in a statute is sufficient to create a lien, or to authorize a bank to adopt a by-law for that purpose? A statutory provision that all debts due to the bank must be first paid before any transfer can be made raises a lien;⁶³ and authority to make by-laws not inconsistent with the laws of the State for managing the bank's property and regulating the transfer of its stock will justify the creation of a lien in that manner.⁶⁴

25. Notice of Lien.

Whenever a lien is established by general statute or charter, original holders and subsequent purchasers are presumed to know the law, like any other, and cannot plead ignorance.⁶⁵

61 *Fitzhugh v. Bank*, 3 T. B. Mon. (Ky.) 126.

62 *Ibid.*

63 *Farmers' Bank of Maryland Case*, 2 Bland Ch. (Md.) 394.

64 *Pendergast v. Bank*, 2 Saw. (U. S.) 108; *Brent v. Bank*, 10 Pet. (U. S.) 596; *In re Dunkerson*, 4 Biss. (U. S.) 227; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; *Cunningham v. Ala. Life Ins. & Trust Co.*, 4 Ala. 652; *Bryon v. Carter*, 22 La. Ann. 98.

65 *Union Bank v. Laird*, 2 Wheat. (U. S.) 390; *National Bank v. Watson*, 105 U. S. 217; *Brent v. Bank*, 10 Pet. (U. S.) 596, 616; *Grant v. Mechanics' Bank*, 15 Serg. & R. (Pa.) 140; *Rogers v. Huntington Bank*, 12 Serg. & R. (Pa.) 77; *Sewall v. Lancaster Bank*, 17 Serg. & R. 285; *Tete v. Farmers' & Mech. Bank*, 4 Brewst. (Pa.) 308; *Downer v. Zanesville Bank*, *Wright* (Ohio) 477; *Bank v. Smalley*, 2 Cow. (N. Y.) 770; *Farmers' Bank v. Iglehart*, 6 Gill (Md.) 50, 56; *Leggett v. Bank*, 24 N. Y. 283; *Mohawk Nat. Bank v. Schenectady Bank*, 78 Hun 90, *affd.* 151 N. Y. 665; *Reese v. Bank*, 14 Md. 271; *Bank v. Pinson*, 58 Miss. 421; *Bohmer v. City Bank*, 77 Va. 445.

"Usually the lien, when it exists at all, is given by the charter, which being a public law, as well as the act by which the corporation is created, is notice to all persons dealing with the company . . . By-laws are mere regulations of the corporation for the control and management of its

Moreover the rule includes all persons, whether living in the State where the corporation exists, or elsewhere.⁶⁶

And whenever a lien is founded on usage, not deriving its existence from positive law, or on a by-law authorized by statute, the original owner of stock is charged with notice of it;⁶⁷ for, as he is a member of the corporation, he is presumed to know of its existence; also the assignee or purchaser who has actual notice;⁶⁸ but not otherwise.⁶⁹ This is the true distinction between the effect of a lien existing by usage or by by-law, and by positive authority, though it has not always been observed.⁷⁰

Nor does a judgment-creditor of a stockholder occupy the

own affairs. They are not intended to interfere in least with the rights and privileges of others who do not subject themselves to their influence." *Bank v. Pinson*, 58 Miss. 421, 436; *Union Bank v. Laird*, 2 Wheat. (U. S.) 390.

66 *Bishop v. Globe Co.*, 135 Mass. 132.

67 *Planters' Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585; *Stebbins v. Phoenix Ins. Co.*, 3 Paige (N. Y.) 350; *Morgan v. Bank*, 8 Serg. & R. (Pa.) 73; *Farmers & Traders' Bank v. Haney*, 87 Iowa 101; *Des Moines Nat. Bank v. Warren Co. Bank*, 97 Iowa 204; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; *St. Louis Ins. Co. v. Goodfellow*, 9 Mo. 149; *M'Dowell v. Bank*, 1 Har. (Del.) 27; *Bank v. Pinson*, 58 Minn. 421; *Tuttle v. Walton*, 1 Ga. 43; *Vansands v. Middlesex Co. Bank*, 26 Conn. 144; *Tete v. Farmers' & Mech. Bank*, 4 Brewst. (Pa.) 308; *Bank v. Durfee*, 118 Mo. 431, 445.

68 *Morgan v. Bank*, 8 Serg. & R. (Pa.) 73; *St. Louis Ins. Co. v. Goodfellow*, 9 Mo. 149; *Bank v. Pinson*, 58 Miss. 421.

69 *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359; *People v. Crockett*, 9 Cal. 112; *Bank v. Pinson*, 58 Mass. 421; *Owens v. Atlanta Trust & Bkg. Co.*, 122 Ga. 521; *Driscoll v. West Bradley Mfg. Co.*, 59 N. Y. 96, 109; *Bank v. Durfee*, 118 Mo. 431, 444. A clause in the articles of association of a bank, recorded in a public office, that "no shares shall be transferable on which any installment is unpaid, or the subscriber is indebted to the bank," unless a majority of the bank consents thereto, is not enforceable against a purchasing holder of the certificate containing no reference to the articles, and which were unknown by him. *Lyman v. State Bank*, 81 N. Y. App. Div. 367, *affd.* 179 N. Y. 577.

70 See *Bank v. Pinson*, 58 Miss. 421, 435. Though a bank may require a transfer to be registered, it cannot make this depend on the approval and acceptance of the directors. *Farmers' & Mech. Bank v. Wasson*, 48 Iowa 336.

position of an innocent purchaser without notice of the bank's lien. He does not occupy a position as favorable as that of an innocent purchaser or pledgee. He does not buy nor lend on the faith of the stock. His judgment therefore binds only the property of the stockholder; it cannot bind anything more.⁷¹

In some jurisdictions the courts throw their protection still further over an innocent purchaser or lender. A stockholder who has no knowledge of a bank's lien derived from the stock certificate may have a lien for a loan made thereon superior to the bank's lien for the pledgor's indebtedness.⁷² Yet a stockholder is generally presumed to have knowledge of the articles of association and in this respect stands on different ground from a stranger.⁷³

26. Bank Can Hold Entire Stock.

Whenever a lien exists, the bank may retain the entire amount of the debtor's stock, if so minded, though a part would be enough to pay the debt.⁷⁴ Nor is the bank's lien affected by the amount of the stockholder's deposit.⁷⁵

27. Lien May be Waived.

Of course, a bank may waive its lien.⁷⁶ Of this act a transfer would be conclusive evidence;⁷⁷ so would be a negative as-

⁷¹ *Owens v. Atlanta Trust & Bkg. Co.*, 122 Ga. 521.

⁷² *Lyman v. State Bank*, 179 N. Y. 577, affg. 81 N. Y. App. Div. 367.

⁷³ See Chap. III. §1.

⁷⁴ *Pierson v. Bank*, 3 Cranch. C. C. (U. S.) 363. See *Union Bank v. Laird*, 2 Wheat. (U. S.) 390.

⁷⁵ *Mechanics' Bank v. Earp*, 4 Rawle (Pa.) 384; *People's Home Sav. Bank v. Rickard*, 139 Cal. 285.

⁷⁶ *National Bank v. Watson town Bank*, 105 U. S. 217; *St. Paul Nat. Bank v. Life Ins. Clearing Co.*, 71 Minn. 123; *Hodges v. Planters' Bank*, 7 Gill & J. (Md.) 484; *Reese v. Bank*, 14 Md. 271; *Bank v. McNeil*, 10 Bush (Ky.) 54; *Bank v. Pinson*, 58 Miss. 421; *Oakland Co. Sav. Bank v. State Bank*, 113 Mich. 284. See review of this case in Chap. IX. §18.

⁷⁷ *Hill v. Pine River Bank*, 45 N. H. 300; *Des Moines Loan & Trust Co. v. Des Moines Nat. Bank*, 97 Iowa 668; *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 291.

sertion by a competent officer ⁷⁸ in answer to an appropriate inquiry whether the stock of a particular individual was encumbered.⁷⁹ But the acceptance of other security would not be a waiver unless this intention was clearly shown;⁸⁰ on the other hand, such action would be regarded as creating additional security.⁸¹ Nor would the transfer of a part of one's stock with the bank's permission act as a waiver on the remainder.⁸²

28. What Indebtedness is Included.

The lien includes both matured and unmatured obligations;⁸³ a contingent liability as an endorser,⁸⁴ an overdraft;⁸⁵ and a debt that has matured after the sale of one's stock, but prior to the assignee's demand for its transfer.⁸⁶ It does not include arrears for enforced calls,⁸⁷ nor the stock of one person owned in severalty for the debt of another;⁸⁸ nor the stock of an as-

78 *Kenton Ins. Co. v. Bowman*, 84 Ky. 430.

79 *Oakland Co. Sav. Bank v. State Bank*, 113 Mich. 284; *Moore v. Bank of Commerce*, 52 Mo. 377. See Chap. IX. §18.

80 *St. Paul Nat. Bank v. Life Ins. Clearing Co.*, 71 Minn. 123; *McLean v. Lafayette Bank*, 3 McLean (U. S.) 587.

81 *Union Bank v. Laird*, 2 Wheat. 390; *Kenton Ins. Co. v. Bowman*, 84 Ky. 430.

82 *First Nat. Bank v. Hartford Ins. Co.*, 45 Conn. 22.

83 *Leggett v. Bank*, 24 N. Y. 283; *Grant v. Mechanics' Bank*, 15 Serg. & R. (Pa.) 140; *Downer v. Zanesville Bank*, Wright, Ch. (Ohio) 477; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149, 154; *Rogers v. Huntingdon Bank*, 12 Serg. & R. (Pa.) 77.

84 *Ibid*; *M'Dowell v. Bank*, 1 Harr. (Del.) 27; *Brent v. Bank*, 10 Pet. (U. S.) 596; *West Branch Bank v. Armstrong*, 40 Pa. 278; *Bank v. Bonnie*, 102 Ky. 343.

85 *Reese v. Bank*, 14 Md. 271.

86 *Michigan Trust Co. v. State Bank*, 111 Mich. 306; *Citizens' State Bank v. Kalamazoo Co. Bank*, 111 Mich. 313; *Oakland Co. Sav. Bank v. State Bank*, 113 Mich. 284. A bank may assert a lien on the stock of its members for their indebtedness against a transferee who purchases the stock before, but does not present it for transfer, until after the original holder has become indebted to the bank. *Stafford v. Produce Ex. Bkg. Co.*, 61 Ohio St. 160; *Des Moines Nat. Bank v. Warren Co. Bank*, 97 Iowa 204; *Farmers & Traders' Bank v. Haney*, 87 Iowa, 101.

87 *Kahn v. Bank*, 70 Mo. 262.

88 *Presbyterian Congregation v. Carlisle Bank*, 5 Pa. 345.

signor for the debt of his assignee;⁸⁹ nor the assignor's stock for notes made or endorsed by him after parting with the title;⁹⁰ nor stock held in trust;⁹¹ nor the indebtedness of a stockholder to a third person acquired by the bank.⁹²

Nor is a bank's lien limited to the holders of the legal title to its stock; equitable holders also are included.⁹³

29. Lien Does Not Prevent a Sale or Transfer.

The existence of such a lien does not prevent a stockholder from selling or assigning his stock; the purchaser or assignee acquiring an equitable interest therein,—whatever may be left after discharging the assignor's indebtedness to the bank.⁹⁴ Nor does a lien prevent the administrator or executor of a deceased stockholder from demanding a transfer to himself as his representative.⁹⁵

89 *Helm v. Swiggett*, 12 Ind. 194.

90 *Reese v. Bank*, 14 Md. 271; *Nesmith v. Washington Bank*, 6 Pick. (Mass.) 324; *Callanan v. Edmunds*, 32 N. Y. 483; *Conant v. Reed*, 1 Ohio St. 298. After an assignee has demanded a transfer, but refuses to pay the debts then due the bank by the stockholder, and afterwards makes another demand when other notes of the stockholder become payable, he must pay all the debts due at the time of the last demand in order to obtain a transfer. *Reese v. Bank*, 14 Md. 271. A bank's lien for a stockholder's indebtedness is subordinated to that of a pledgee for the stockholder's prior indebtedness. *Curtice v. Crawford Co. Bank*, 56 C. C. A. 174.

91 *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299.

92 *Boyd v. Redd*, 120 N. C. 335. "The statutory lien on stock is intended only to secure the direct indebtedness which the stockholder creates with the corporation, either as principal or surety, and not any involuntary indebtedness to it caused by the purchase of his liabilities incurred to third parties." *Ibid*.

93 *Planters' Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585, 594. As against a judgment creditor who has levied on a subscriber's stock, the bank has a lien for the note made by him before the levy, but maturing afterwards. *Sewall v. Lancaster Bank*, 17 Serg. & R. (Pa.) 285. When a bank refuses to sell the stock of a deceased stockholder, retained for his indebtedness, a court will order its sale on the application of the administrator, and apply the proceeds on the debt. *In re Farmers' Bank*, 2 Bland Ch. (Md.) 394. The right of lien does not include the bank's right of sale. *Tete v. Farmers' & Mech. Bank*, 4 Brewst. (Pa.) 308.

94 *Farmers' Bank v. Iglehart*, 6 Gill (Md.) 50, 56; *Conant v. Reed*, 1 Ohio St. 298. See §12.

95 *London Bank v. Aronstein*, 54 C. C. A. 663.

30. Validity of Improper By-law on Purchases.

How far is a purchaser bound by a lien founded on a by-law adopted without proper authority? Surely, if he had no knowledge of it, he would not be bound, and it may well be questioned, even if he did know, whether it would be more effective.⁹⁶

31. Lien Survives, Though Debt is Barred.

Though a bank's debt is barred by legal limitations, its lien on the debtor's stock survives. The debt, though barred, is not extinguished, and the lien on the stock follows, or runs with the debt,⁹⁷ and may be enforced in equity.⁹⁸

32. Lien of Private Bank.

A private bank has no lien on the stock of a member for his indebtedness,⁹⁹ nor for additional claims if it should be pledged for a particular one.¹

33. Lien on Dividends.

Though a bank may be forbidden to claim a lien on the stock of one of its stockholders for his indebtedness, the prohibition does not prevent the assertion of the bank's right to the money that has accrued thereon as a dividend.² The bank's preference is the same as that of a partnership creditor over that of an individual creditor in the estate of a partnership.³ There is a just limitation to this rule, a dividend due an indi-

96 *Bank v. Manufacturers & Traders' Bank*, 20 N. Y. 501.

97 *Farmers' Bank v. Iglehart*, 6 Gill (Md.) 50. See *Jones on Pledges*, §§581, 582, and cases cited. See Ch. VII. §26c.

98 *Wood on Limitations*, §232.

99 *Neale v. Janney*, 2 Cranch C. C. (U. S.) 188.

1 *Ibid.*

2 *Hagar v. Union Nat. Bank*, 63 Me. 509; *Gemmell v. Davis*, 75 Md. 546; *Donnelly v. Hearndon*, 41 W. Va. 519; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; *Hague v. Dandeson*, 2 Ex. (Eng.) 741.

3 *German Security Bank v. Jefferson*, 10 Bush (Ky.) 326. Though a by-law is passed, unknown to a stockholder, establishing a lien on his dividends so long as he is a debtor to the bank, it may be enforced against his donee of them. *Bellevue Bank v. Highbee*, 4 Ohio Cir. Ct. 222.

vidual stockholder cannot be applied to pay the debt of a partnership of which he is a member.⁴

A dividend accruing after the sale of stock, but before the bank had received any knowledge of the transaction could once be retained to pay a debt actually due at the time the bank learned of the sale.⁵ It may be questioned whether this rule any longer prevails.⁶

A dividend declared after the debtor has transferred his stock cannot be withheld, because it belongs to the assignee or purchaser.⁷ And the same rule applies to a dividend declared after the death of an insolvent stockholder who is indebted to the bank.⁸

34. Who Are Stockholders.

The stock-book is supposed to contain a correct record of the stockholders,⁹ but as we shall hereafter learn, the real stockholder may be another person. He may have parted with his interest without completing the transfer. This question has most frequently arisen when stockholders have been required to make additional payments to discharge the indebtedness of their bank, and the law will be presented in that connection. The question also occasionally arises at the meetings of stockholders, especially in contests for control.¹⁰

4 *American Nat. Bank v. Nashville Warehouse Co.*, 36 S. W. (Tenn. Ch. App.) 960. See *Flint v. Tillman*, 2 Heisk. (Tenn.) 202.

5 *Bates v. N. Y. Ins. Co.*, 3 Johns. Cas. (N. Y.) 238; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149, 153.

6 *Gemmell v. Davis*, 75 Md. 546; *American Nat. Bank v. Nashville Warehouse Co.*, 36 S. W. (Tenn. Ch. App.) 960.

7 *Gemmell v. Davis*, 75 Md. 546; *Abercrombie v. Riddle*, 3 Md. Ch. 320.

8 *Brent v. Bank*, 2 Cranch C. C. (U. S.) 517; *Attorney General v. State Bank*, 1 Dev. & B. Eq. (N. C.) 515; *Merchants' Bank v. Shouse*, 102 Pa. 448.

9 *O'Connor v. Witherby*, 111 Cal. 523; *Coffin v. Collins*, 17 Me. 440; *Agricultural Bank v. Burr*, 24 Me. 256; *U. S. Trust Co. v. U. S. Fire Ins. Co.*, 18 N. Y. 199; *Hoppin v. Buffum*, 9 R. I. 513; *Wilson v. Central Bridge*, 9 R. I. 590; *Turnbull v. Payson*, 95 U. S. 418; *Williams v. American Nat. Bank*, 29 C. C. A. 203. See 1 Cook on Corp. §55.

10 A stockholder purchased a large amount of stock for the purpose of controlling the election of directors, and after accomplishing his purpose

35. Stockholders' Meetings.

The statutes prescribe how stockholders' meetings shall be conducted, and very few questions of this nature have arisen among bank corporations. They must be called in the manner prescribed by statute, or charter, for the direction is mandatory.¹¹ A substantial compliance will satisfy this requirement.¹²

Meetings are regular, and special; and positive law makes some regulations concerning them, which are supplemented by by-laws, adopted by the stockholders, or by the directors when endowed with authority to prepare and adopt them.¹³

Stockholders must be duly notified¹⁴ of any meeting, and if it be regular the stockholders need not be notified of the business that is to be presented, unless it be of unusual importance.¹⁵ But whenever a special meeting is called the notice must state the object.¹⁶ Defects, however, in the notice may be waived by attendance, or ratified expressly by acquiescence.¹⁷ And if a stockholder was present himself or by proxy, and participated without objection to the notice, he cannot afterward complain;¹⁸ nor can other stockholders who

sold the stock to the company. The sale was declared to be legal, as the stock was sold at a fair price. *Taylor v. Miami Exposition Co.*, 6 Ohio 176.

11 *Matthews v. Columbia Nat. Bank*, 79 Fed. 558.

12 *Hardenberg v. Farmers' & Mech. Bank*, 3 N. J. Eq. 68.

13 See Boisot on By-Laws, §92.

14 *People v. Batchelor*, 22 N. Y. 128, 134; 1 *Morawetz on Corp.* §479.

15 *Warner v. Mower*, 11 Vt. 385; *Sampson v. Bodoinham Steam Mill Co.*, 36 Me. 78.

16 *Imperial Bank of China v. Bank of Hindustan*, L. R. 6 Eq. (Eng.) 91; *Stow v. Wyse*, 7 Conn. 214, 219; *Atlantic De Laine Co. v. Mason*, 5 R. I. 463, 471.

17 *Nelson v. Hubbard*, 96 Ala. 238; *Central Trust Co. v. Condon*, 14 C. C. A. 314; *Synnott v. Cumberland B. & L. Assn.* 54 C. C. A. 553, 559; *Kenton Furnace R. v. McAlpin*, 5 Fed. 737. This requirement may be waived by stockholders by attending and participating in the special meeting without objection. *Synnott v. Cumberland B. & L. Assn.*, 54 C. C. A. 553.

18 *Columbia Nat. Bank v. Matthews*, 29 C. C. A. 491; *Nickum v. Burckhardt*, 30 Or. 464.

have not been injured.¹⁹ A stockholder can vote by proxy only when authorized by statute, articles, or by-laws of the bank.²⁰ And the authority thus conferred on another may be revoked at any time.²¹ Lastly, no notice of an adjourned meeting need be given to absent stockholders unless this is required by statute or by-law.²²

By common law less than a majority of the stockholders may hold a properly convened meeting, but a different rule is often established by statute, or by-law.²³ Where a majority is required, a smaller number, though unable to hold a valid meeting, can lawfully adjourn.²⁴ Again, while a minority of stockholders cannot call and hold a stated meeting,²⁵ they can continue a meeting regularly called after the majority have withdrawn.²⁶

A different rule applies to directors, because they are a select, definite body, while stockholders are the constituent members. By the common law, therefore, a majority of the stockholders who appear can act, while a majority of the definite body must be present, and then a majority of the quorum may decide.²⁷

A court may enjoin a corporation from denying to a stockholder his right to vote,²⁸ or enjoin it for receiving the vote

19 Appeal of Columbia Nat. Bank, 16 Pa. Week. Notes, 357.

20 McKee v. Home Sav. & Trust Co., 98 N. W. (Iowa) 609; Commonwealth v. Bringham, 103 Pa. 134; Commonwealth v. Detwiler, 131 Pa. 614, 623, 634; Market St. R. v. Hellman, 109 Cal. 571; People v. Crossley, 69 Ill. 195.

21 Reed v. Bank, 6 Paige (N. Y.) 337.

22 Western Imp. Co. v. Des Moines Nat. Bank, 103 Iowa 455; Smith v. Law, 21 N. Y. 296; Synnott v. Cumberland B. & L. Assn., 54 C. C. A. 553, 559; Warner v. Mower, 11 Vt. 385, 391.

23 Gilchrist v. Collopy, 82 S. W. (Ky.) 1018.

24 Ellsworth Woollen Mfg. Co. v. Faunce, 79 Me. 440.

25 Haskell v. Read, 68 Neb. 107.

26 Ibid.

27 Gilchrist v. Collopy, 82 S. W. (Ky.) 1018; 2 Kent's Com., p. 293.

28 Brown v. Pacific Mail Steamship Co., 5 Blatch. (U. S.) 525.

A pledgor can vote his stock. Haskell v. Read, 68 Neb. 107. A stockholder need not be required to pay for his stock before voting. Haskell

of one who has no right to cast the same.²⁹ A vendor is entitled to vote on his stock until the transfer is recorded³⁰; also the pledgor, mortgagor,³¹ trustee,³² and administrator.³³

In conducting an election, an officer of the corporation cannot look behind the books, showing who are registered, for the purpose of learning who are members; but a court of equity can do so, and enjoin a pledgee, for example, from voting shares pledged to the prejudice of the pledgor.³⁴

An election is not invalid because the meeting is continued beyond the time prescribed by law, by-law, or notice, and votes are received until the close.³⁵ Nor will the opening of the polls to receive additional votes invalidate an election,³⁶ if this is done before announcing the result; but the polls cannot be opened afterwards.³⁷ The stockholders have a right by quo warranto to inquire into the validity of an election,³⁸ and ask for adequate relief by having the election set aside for fraud,

v. Read, 68 Neb. 107; Price v. Holcomb, 89 Iowa 123; Savage v. Ball, 17 N. J. Eq. 142.

29 George v. Cent. R. & Banking Co., 101 Ala. 607; Clarke v. Cent. R. & Bkg. Co., 50 Fed. 338.

30 McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 332; Johnston v. Jones, 23 N. J. Eq. 216, 223; Monsseaux Urquhart, 19 La. Ann. 482; Hoppin v. Buffum, 9 R. I. 513.

31 Hoppin v. Buffum, 9 R. I. 513; Scholfield v. Union Bank, 2 Cranch C. C. (U. S.) 115; Ex Parte Wilcocks, 7 Cow. (N. Y.) 402. Application of Barker, 6 Wend. 509.

32 Hoppin v. Buffum, 9 R. I. 513; In re Mohawk & Hudson R., 19 Wend. (N. Y.) 135; Application of Barker, 6 Wend. 509. See Wilson v. Central Bridge, 9 R. I. 590.

33 In re North Shore Ferry Co., 63 Barb. (N. Y.) 556.

34 Haskell v. Read, 68 Neb. 107; Brewster v. Hartley, 37 Cal. 15; State v. Smith, 15 Or. 98; Vowell v. Thompson, 3 Cranch C. C. (U. S.) 428.

35 In re Mohawk & Hudson R., 19 Wend. 135; Rudolph v. Southern League, 23 Abb. N. C. 199.

36 Hardenburgh v. Farmers' & Mech. Bank, 3 N. J. Eq. (2 Green) 68, 82.

37 Forsyth v. Brown, 2 Pa. Dist. 765.

38 Wiltz v. Peters, 4 La. Ann. 339.

surprise, or other illegality.³⁹ They must come into court with clean hands; guilty participants cannot invoke its aid.⁴⁰

No records need be kept of the proceedings of a corporate meeting, unless expressly required; and if none exist, its action may be proved by parol.⁴¹ When records are kept these may be shown on proper occasion.⁴² When existing and properly authenticated, they are admissible as the best evidence to prove what was done,⁴³ they are the regular evidence of a bank's action.⁴⁴

36. Their Right to Inspect Books.

The right of a stockholder to inspect at all reasonable times the books and other records of his bank by common law or statute is unquestioned.⁴⁵ Indeed, this right may be exercised after his bank has gone into liquidation, or its charter has expired.⁴⁶ Nor is the common law right abridged by the na-

39 *Jackson v. Munster Bank*, 13 L. R. (Irish) 118; *Cannon v. Trask*, L. R. 20 Eq. (Eng.) 669; *Nathan v. Tompkins*, 82 Ala. 437; *Johnston v. Jones*, 23 N. J. Eq. 216; *In re Argus Co. v. Manning*, 138 N. Y. 357.

40 *Wiltz v. Peters*, 4 La. Ann. 339.

41 *Bank v. Schuylkill Bank*, 1 Pars. Eq. Cas. (Pa.) 180; *Handley v. Stutz*, 139 U. S. 417, 422; *Moss v. Averell*, 10 N. Y. 449; *Selley v. Am. Lubricator Co.*, 119 Iowa 591, 596.

42 *Selley v. Am. Lubricator Co.*, 119 Iowa 591, 596.

43 *People v. Oakland Co. Bank*, 1 Doug. (Mich.) 282; *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369; *Lane v. Brainerd*, 30 Conn. 565; *Coffin v. Collins*, 17 Me. 440.

44 *Coffin v. Collins*, 17 Me. 440.

45 *Harkness v. Guthrie*, 75 Pac. (Utah) 624, *affd.* 199 U. S. 149; *Meyersburg v. People*, 88 Ill. App. 328; *People v. Consolidated Nat. Bank*, 105 N. Y. App. Div. 409; *Winter v. Baldwin*, 89 Ala. 483; *Matter of Tuttle v. Iron Nat. Bank*, 170 N. Y. 9; *Hatch v. City Bank*, 1 Rob. (La.) 470; *Cockburn v. Union Bank*, 13 La. Ann. 289; *State v. Citizens' Bank*, 51 La. Ann. 426; *State v. Laughlin*, 53 Mo. App. 542; *Union Nat. Bank v. Hunt*, 76 Mo. 439; *Huylar v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 398; *Gerner v. Mosher*, 58 Neb. 135; *Deaderick v. Wilson*, 8 Bax. (Tenn.) 108. See valuable notes containing many cases in 14 Am. & Eng. Corp. Cases (N. S.) 906 and 107 Am. State Rep. 674.

46 *Matter of Tuttle v. Iron Nat. Bank*, 170 N. Y. 9; *Matter of Steinway*, 159 N. Y. 251.

tional banking statute.⁴⁷ If denied the right, he can invoke the aid of a court, which will issue a mandamus,⁴⁸ and a national bank stockholder may avail himself of the statutory right of inspection and mode of procedure adopted by a state.⁴⁹ Nor is the opposition of a stockholder to the managers a justification for excluding him.⁵⁰ Furthermore, a stockholder may use an expert, attorney or other assistance in making his investigation.⁵¹ A different rule applies to the inspection of the minutes of directors' meetings. A strong case is required to justify such a demand by a stockholder.⁵²

But a court may deny the right of inspection if demanded for an illegitimate purpose and may regulate the time of inspection.⁵³ But where it is sought for a legitimate purpose, and the application is made during business hours, the right to such inspection is mandatory.⁵⁴

37. Their Right to Ratify Directorial Action.

Stockholders in their meetings can, and often do, express their approval or disapproval of the conduct of their directors. Doubtless no negative action of theirs would be effective pertaining to matters within directorial authority; a different rule

47 *Guthrie v. Harkness*, 199 U. S. 149. And a national bank stockholder can enforce his right in a state court. *Ibid.*

48 *Hatch v. City Bank*, 1 Rob. (La.) 470; *Cockburn v. Union Bank*, 13 La. Ann. 289; *Am. Railway Frog Co. v. Haven*, 101 Mass. 398. In *re White River Bank*, 23 Vt. 478; *People v. Nassau Ferry Co.*, 86 Hun (N. Y.) 128. A stockholder in a national bank is not entitled to a mandamus issued by a federal court unless the amount exceeds \$2,000. *Large v. Consolidated Nat. Bank*, 137 Fed. 168.

49 *People v. Consolidated Nat. Bank*, 105 N. Y. App. Div. 409.

50 *People v. Throop*, 12 Wend. (N. Y.) 183; *Hatch v. City Bank*, 1 Rob. (La.) 470; *Ellsworth v. Dorwart*, 95 Iowa 108.

51 *State v. Citizens' Bank*, 51 La. Ann. 426; *Mitchell v. Rubber Co.*, 24 At. (N. J.) 407; *People v. Nassau Ferry Co.*, 86 Hun (N. Y.) 128; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189; *Ellsworth v. Dorwart*, 95 Iowa 108; *Foster v. White*, 86 Ala. 467.

52 2 Cook on Corp. §517.

53 *People v. Consolidated Nat. Bank*, 105 N. Y. App. Div. 409.

54 *Ibid.*, 412.

applies to action beyond this boundary. When this is transcended stockholders can act effectively.⁵⁵

Another limitation on the particular stockholders who can thus act should be mentioned. The unauthorized action of a board taken before complete organization can be ratified only by bona fide stockholders.⁵⁶

38. Their Right to Compel Managers to Regard the Law.

The great remedy of stockholders against unwise or corrupt management is to change their managers. The laws of every state provide for annual elections at which this can be done. During the interval between one election and another, stockholders are not helpless. By the earlier law their remedy against directors was very limited. If, for example, they took no steps to prevent the collection of a tax, levied under a clearly unconstitutional law, a stockholder could ask a court of equity to restrain its collection.⁵⁷ A single stockholder could not maintain an action against directors for negligence in conducting the affairs of the bank and wasting its resources.⁵⁸ He was obliged to wait until others could be legally elected. In the meantime the governing board might proceed with the swift intelligence and unresting energy, so often associated with rascality, to demonstrate their unworthiness.

This remedy proved to be too slow and ineffective. Before the next election directors may ruin a bank. Nevertheless a single stockholder cannot maintain an action against the directors for injury done thereto, or to its capital, by their negligence or misfeasance, for the injury does not concern him alone, but the entire body of stockholders in common.⁵⁹ If, however, the bank will not act, after a proper demand has been

55 See Chap. IX. §35.

56 *McNulta v. Corn Belt Bank*, 164 Ill. 427.

57 *Dodge v. Woolsey*, 18 How. (U. S.) 331.

58 *Hersey v. Veazie*, 24 Me. 1; *Smith v. Hurd*, 12 Met. (Mass.) 371; *Craig v. Gregg*, 83 Pa. 19; *Allen v. Curtis*, 26 Conn. 456.

59 *Smith v. Hurd*, 12 Met. 371; *Conway v. Halsey*, 44 N. J. Law 462.

made on the directors⁶⁰ by one or more stockholders, then he or they can invoke the aid of a court of equity.⁶¹ In doing this, the stockholders must show that the bank refuses to act, and that, unless redress is granted, they will suffer. A clear case for action must appear.⁶² As the inquiry is general, the action is for the benefit of all the members. It is in essence an action to enforce the rights of the bank and to recover the money due thereto. The bank itself should be made a party defendant.⁶³

In actions by stockholders against directors, the statute runs in favor of the latter in the same manner as in actions of the bank against them.⁶⁴

In what manner does this statute run in such actions? There are at least three classes of cases, those in which the liability (a), is penal or statutory;⁶⁵ (b) or contractual;⁶⁶ (c) or arises from wrongdoing.⁶⁷ In the first and second classes the limitation begins to run from the time the statute or contract was

60 *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Morgan v. King*, 27 Colo. 540.

61 *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Hawes v. Oakland*, 104 U. S. 450; *Porter v. Sabin*, 149 U. S. 473, 478; *Heath v. Erie R.*, 8 Blatch. (U. S.) 347, 393; *Morgan v. King*, 27 Colo. 539; *Allen v. Curtis*, 26 Conn. 456; *Hersey v. Veasie*, 24 Me. 1; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Greaves v. Gouge*, 69 N. Y. 154; *Robinson v. Smith*, 3 Paige (N. Y.) 222, 233; *Bixler v. Summerfield*, 195 Ill. 147; *Green v. Hedenberg*, 159 Ill. 489; *Wilcox v. Bickel*, 11 Neb. 154. See *Killen v. Barnes*, 106 Wis. 546.

62 *Porter v. Sabin*, 149 U. S. 473, 478; *Davenport v. Dows*, 18 Wall. (U. S.) 626; *Allen v. Curtis*, 26 Conn. 456; *Hersey v. Veasie*, 24 Me. 1; *Morgan v. King*, 27 Colo. 539.

63 *Ibid.*

64 *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Godbold v. Bank*, 11 Ala. 191; *Williams v. Halliard*, 38 N. J. Eq. 373, 378; *Spring's Appeal*, 71 Penn. 11, 17, 25; *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 193. See Ch. VIII. §40a.

65 *Brinckerhoff v. Bostwick*, 99 N. Y. 185. See Chap. VIII. §40.

66 *Ibid.* *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630.

67 *Brinckerhoff v. Bostwick*, 99 N. Y. 185; *Morgan v. King*, 27 Colo. 539.

violated,⁶⁸ in the third class from the time of discovering the wrong.⁶⁹

39. Rights of Minority.

Nor can the rights of the minority be wilfully disregarded. Again and again the control of a corporation is gained by a family who seek to use it for their own advantage, rather than for the good of all. When this is attempted, and proof of their perversion of authority is clear, courts will protect the minority in such a manner as the circumstances require.⁷⁰

40. Right to Dividends.

(a) The statutes regulate the mode of declaring dividends. The occasions on which the bank can retain them have already been considered.⁷¹ The owner of the stock at the time of declaring the dividend is entitled thereto regardless of the time of payment.⁷² His subsequent sale of the stock does not impair his right to the dividend.⁷³ On the other hand, the purchaser is entitled to all dividends subsequently declared, though there may have been no transfer of the stock on the books of the bank.⁷⁴ And the same principle may be applied to a capital dividend.⁷⁵ Thus a bank reduced its capital stock with the approval of the controller of the currency. If the full

⁶⁸ Same cases as 66.

⁶⁹ Same cases as 67.

⁷⁰ *Bixler v. Summerfield*, 195 Ill. 147.

⁷¹ See §33 for bank's lien on dividends.

⁷² *Gemmell v. Davis*, 75 Md. 546; *Cogswell v. Second Nat. Bank*, 78 Conn. 75; 2 Cook on Corp. §539.

⁷³ *Ibid*; *Redhead v. Iowa Nat. Bank*, 103 N. W. (Iowa) 796; *Bank v. Gray*, 84 Ky. 565; *Hagar v. Union Nat. Bank*, 63 Me. 509.

⁷⁴ *Farmers' & Merch. Nat. Bank v. Mosher*, 63 Neb. 130. A bank is protected in paying a dividend to a recorded stockholder if having no evidence of a transfer previous to the time of declaring the dividend. *Bank of Commerce's Appeal*, 73 Pa. 59; *Gemmell v. Davis*, 75 Md. 546, 552. But a bank is liable to a transferee for a dividend declared after the registry of his stock had been requested and improperly refused. *Robinson v. National Bank of New Berne*, 59 N. Y. 637.

⁷⁵ *Cogswell v. Second Nat. Bank*, 78 Conn. 75.

amount of the reduction was not needed to pay the bank's indebtedness, the balance was to be paid to the stockholders. On the expiration of the bank's charter one-fifth of the reduction remained for distribution among the stockholders. Those, therefore, who were members of the bank at the time of making the reduction were entitled thereto.⁷⁶ Furthermore, their right to this fund was assignable by each member with or without a transfer of his stock.⁷⁷

(b.) In paying dividends on stock bequeathed by will, the general rule is, the legatee is entitled to those declared after the testator's death, while those declared previously, but payable afterwards, belong to the estate.⁷⁸

An important question not infrequently has arisen in paying dividends given by will or otherwise to one for life, and the stock after his death to another. In paying the ordinary annual or other periodical dividend the duty of the trustee is simple enough; but occasionally a bank will sell its property and pay over the proceeds in the form of a dividend; or make an unusual dividend in cash of stock based on the profits accumulated in part or entirely before the testator's death. Shall the dividends declared under these circumstances be paid to the life tenant or to the remainderman? The question has perplexed many courts, and they have been greatly divided in opinion.

The initial principle admitted by all of them is that the answer should be in accordance with the testator's wish whenever that can be ascertained.⁷⁹ If this desired guide cannot be found, then the courts have applied several rules with varying success.

First. That cash dividends go to the life tenant and stock

⁷⁶ Ibid. ⁷⁷ Ibid.

⁷⁸ In matter of Kernochan, 104 N. Y. 618. See 2 Perry on Trusts, §545.

⁷⁹ Gibbons v. Mahon, 136 U. S. 549, 559; Clarkson v. Clarkson, 18 Barb. (N. Y.) 646; Bushee v. Freeborn, 11 R. I. 150; Minot v. Paine, 99 Mass. 101; Deland v. Williams, 101 Mass. 571; Hite v. Hite, 93 Ky. 257, 263; Spooner v. Phillips, 62 Conn. 62; Cobb v. Fant, 36 S. C. 1.

dividends to the remainderman.⁸⁰ This is often called the Massachusetts rule. "A trustee needs some plain principle to guide him," so the court in the Minot case declared, as if a clear pathway for him was of more importance than a just division between life tenant and remainderman.⁸¹

Secondly. There followed the discovery that earnings were sometimes divided in the form of stock, possibly to favor the remainderman. So the rule in some jurisdictions has been modified and all dividends declared out of earnings, whether in cash or stock, go to the life tenant, while the division of other property or its proceeds goes to the remainderman.⁸² This rule has regard for the substance rather than the form of things.⁸³ When all the earnings thus divided have accumulated since the testator's death, the rule is just and reasonable.

Third. In determining the character of a dividend, whether it is a real division of earnings or not, some courts hold that the action of directors is conclusive,⁸⁴ while others sternly oppose such a position.⁸⁵ The highest federal tribunal has declared that the decision of directors concerning the nature of a dividend is to be accepted by the courts as final, therefore if

80 *Minot v. Paine*, 99 Mass. 101; *Read v. Head*, 6 Allen (Mass.) 174; *Richardson v. Richardson*, 75 Me. 570 and cases cited; *Millen v. Guerrard*, 67 Ga. 284; *Gibbons v. Mahon*, 136 U. S. 549; *Smith v. Dana*, 77 Conn. 543; *Boardman v. Boardman*, 78 Conn. 451.

81 In *Gilkey v. Paine*, 80 Me. 319, 325, the courts say that the "rule supposed to have been established in *Minot v. Paine*, 99 Mass. 101, has proved to be a very elastic rule in the state of its origin; for in *Leland v. Hayden*, 102 Mass. 542, while professing to adhere to it, the court did in fact treat a cash dividend as capital, and a stock dividend as income."

82 *Hite v. Hite*, 93 Ky. 257; *McLouth v. Hunt*, 154 N. Y. 179, affg. 92 Hun 607; *Pritchitt v. Nashville Trust Co.*, 96 Tenn. 472; *Moss's Appeal*, 83 Pa. 264. One who is entitled to the net annual income "of stock can rightfully claim all dividends and bonuses distributed among stockholders." *Gilkey v. Paine*, 80 Me. 319. See 33 Alb. L. J. No. 22, p. 424; *Ibid*, No. 6, p. 106; 19 Am. L. Rev. 737 and 20 Am. L. Rev. 746.

83 *Moss's Appeal*, 83 Pa. 264, 269.

84 *Rand v. Hubbell*, 115 Mass. 461, 474; *Gibbons v. Mahon*, 136 U. S. 549.

85 *McLouth v. Hunt*, 154 N. Y. 179, affg. 92 Hun 607; *Pritchitt v. Nashville Trust Co.*, 96 Tenn. 472.

a stock dividend is declared it should go to the remainderman, while a cash dividend should be paid to the life tenant. The highest federal court is unable to escape from the chain of reasoning forged by the Supreme Court of Massachusetts. "Even granting that directors may act in good faith, on reasons perfectly sound to themselves, they may despoil the life tenant and unduly add to the wealth of the remainderman." The court maintains that "reserved and accumulated earnings, so long as they are held and invested by the corporation, being part of its corporate property, it follows that the interest therein, represented by each share is capital, and not income, as between the tenant for life and the remainderman." If this reasoning be correct, then a stock dividend is not a dividend, no division is effected, but simply a transformation of surplus or earnings into capital. But this transformation by the directors, we contend, ought not, as between the life tenant and remainderman, to change the earnings into anything else; and the courts have a clear duty to perform in conserving the interests of both, and in preventing directors from intentionally or otherwise perverting the interests of both parties.⁸⁶

Justice Gray's contention was a reiteration of a former opinion delivered as Chief Justice of the Supreme Court of Massachusetts. In this he sought to strengthen his position by declaring that "the English judges, though varying in opinion upon the effect of particular votes declaring extraordinary dividends, have all agreed that the determination of each case must turn upon the legal construction of the vote of the corporation."⁸⁷ Other courts have seen with greater clearness

86 In *McLouth v. Hunt*, 154 N. Y. 179, 197, the court said: "That a testamentary provision of this character, for the benefit of both the life tenant and the remainderman . . . can in this way be voted up or down, increased or diminished as the corporation may elect, and that such action precludes the courts from looking into the real nature and substance of the transaction and adjusting the rights of the parties according to justice and equity, is a proposition that cannot be accepted. The mere adoption by the corporation of a resolution cannot change accumulated earnings into capital, as between the life tenant and remainderman."

87 *Rand v. Hubbell*, 115 Mass. 461, 474. By will a trust fund was

that an actual accumulation of profits is what it purports to be, that a board of directors cannot by any resolutions or declarations or use of the money divest it of its real character, and that any attempt to do so should be prevented by proper legal action.

Fourthly. In many cases unusual or extraordinary dividends declared are composed in part at least of the profits or property existing at the time of the testator's death. In such cases the portion earned or existing before his death goes to the remainderman, and the other portion to the life tenant.⁸⁸ This rule, first established in *Earp's Appeal*,⁸⁹ is expanding, though opposed in some jurisdictions.⁹⁰ In one of the latest decisions it was declared that dividends must be regarded in their entirety at the time they are declared, and the life tenant takes the whole, though a portion may have been earned before the testator's death, because it may not be practicable to divide them. It is true that so long as directors act in good faith in making accumu-

created, the income of which was to go to A, and on her death the corpus to B, the remainderman. The fund consisted of stock in two banks, which afterward absorbed the stock of two other banks, and during the process two extra dividends were declared. The funds used in their payment could not be traced to their source, but the stock of each bank was worth more than before. It was held that the dividends were income and therefore went to the life tenant. "Having been paid out of surplus, the presumption is that they were paid out of profits." *Boardman v. Boardman*, 78 Conn. 451, 457.

88 *Van Doren v. Olden*, 19 N. J. Eq. 176; *Lang v. Lang*, 56 N. J. Eq. 603; *Estate of Smith*, 140 Pa. 344; *Earp's Appeal*, 28 Pa. 368; *Moss's Appeal*, 83 Pa. 264; *Biddle's Appeal*, 99 Pa. 278; *McKeen's Appeal*, 42 Pa. 479; *Vinton's Appeal*, 90 Pa. 434; *Phila. Trust Co.'s Appeal*, 24 Pa. Week. Notes 137; *Oliver's Estate*, 136 Pa. 43; *Wiltbank's Appeal*, 64 Pa. 256; *Pritchitt v. Nashville Trust Co.*, 96 Tenn. 472; *Thomas v. Gregg*, 78 Md. 545, containing a good review of cases; *Lord v. Brooks*, 52 N. H. 72; *Cobb v. Fant*, 36 S. C. 1. See note 16 L. R. A. 461.

Contra.—*Brander v. Brander*, 4 Ves. (Eng.) 800; *Paris v. Paris*, 10 Ves. 185.

89 28 Pa. 368.

90 *Hite v. Hite*, 93 Ky. 257. Money earned by a corporation during a stockholder's lifetime, but not distributed as dividends until after his death, is income and goes to the life tenant and not to the remainderman. *DeKoven v. Alsop*, 205 Ill. 309.

lations the court may not listen to the complaint of a life tenant who desires a division; but when a dividend has been declared, whether in cash or stock, it would not be difficult for a court in many cases to determine whether it had been declared out of earnings or other property; and, if out of earnings, what portion had accumulated since the testator's death. And whenever the truth can be ascertained, then the above rule ought to be applied. In other words, the simpler Massachusetts rule ought to be applied only when it is very difficult or impossible to find out the truth.

41. Stock Can be Taken for Owner's Debts.

As a share of stock is in the nature of a chose in action, at common law it could not be taken by a levy of execution. By statute, it can be taken perhaps in every state to satisfy the debt of a creditor of the owner.⁹¹ Furthermore, if a certificate has been issued therefor to the subscriber or purchaser, in the larger number of states, by common law and statute, he can hold the stock, as we have seen against an attaching creditor of the vendor.⁹²

⁹¹ Blair v. Compton, 33 Mich. 414; Slaymaker v. Bank, 10 Pa. 373; Foster v. Potter, 37 Mo. 525; Howe v. Starkweather, 17 Mass. 240; Nabring v. Bank, 58 Ala. 204; Denton v. Livingston, 9 Johns. (N. Y.) 96; Nashville Bank v. Ragsdale, Beck (Tenn.) 296; Princeton Bank v. Crozer, 22 N. J. Law 383, 385; Morgan v. Thames Bank, 14 Conn. 99; Stamford Bank, v. Ferris, 17 Conn. 259; Ball v. Towle Mfg. Co., 67 Ohio St. 306. See §15.

⁹² See §15 and Chap. XXVIII. §2.

CHAPTER V.

LIABILITY OF STOCKHOLDERS.

1. Creditor's claim is against bank while solvent.
2. Stockholders are liable for all capital subscribed.
3. Liability of stockholders who have paid in other property than money.
 - a. Two rules of valuation.
 - b. Better rule.
 - c. Creditor knowing its true worth is not injured by valuation.
 - d. Worth of property at time of valuation must be regarded.
4. Stockholders cannot question necessity of call to pay indebtedness.
5. Liability of stockholders of partly paid stock issued as fully paid.
 - a. Correct rule.
 - b. Liability of ignorant assignee.
6. Liability of bank for partly paid stock taken for debt.
7. Liability of subsequent stockholders of partly paid stock for debts incurred before transfer.
 - a. When assignor is still liable.
 - b. Or for a period.
 - c. When assignor is released.
 - d. When liability is divided between them.
 - e. Liability of assignor for prior assessment.
8. Distinction between stockholders' liability to bank and to its creditors.
9. Remedy to recover unpaid subscriptions.
10. Foreign stockholders.
11. Liability of stockholders for additional capital. Double liability.
 - a. Liability is contractual.
 - b. Not penal.
 - c. Should be construed reasonably.
 - d. Is primary.
 - e. Is purely personal.
 - f. Who can enforce liability by national and state laws.
 - g. What assessment includes.
 - h. Interest on assessment.
 - i. Assessment must be founded on statute.
 - j. What debts are included.
 - k. Law is not retroactive.
 - l. Is for the benefit of all creditors.
 - m. There can be no assessment to cover receiver's misdoings.
 - n. Assessment on an insolvent estate is not entitled to preference.
12. Legality of statute imposing or removing double liability.
13. Triple liability of stockholders.
14. Real holder is liable.
 - a. Transfers in bad and good faith.

- b. Transfers between husband and wife.
- c. Transfers to reorganized banks.
- d. Distinction between ownership for assessment and for other purposes.
- c. Impossibility of establishing an absolute statutory rule.
- f. Liability of unknown transferee.
- g. Liability of nominal holder.
 - g1. Broker and customer.
 - g2. Vendor and unrecorded transferee.
- h. Liability of vendor when bank has neglected to transfer.
- i. Liability of defrauded purchaser.
- j. Liability of an estate.
- k. Exemptions—Married women, trustees, etc.
- l. Liability of bank for stock lawfully purchased.
- m. Liability of holder of stock illegally issued.
- n. Effect of secret transfer on ownership.
- 15. Liability of pledgor and pledgee.
- 16. Division of double liability between assignor and assignee.
- 17. Effect of repealing double liability.
- 18. Recovery of assessment wrongfully paid.
- 19. Liability of officers for debts in excess of capital.
- 20. Receiver's procedure by national banking law against stockholders.
- 21. State procedure.
 - a. By receiver or assignee.
 - b. By creditors.
 - c. Use of attachment.
- 22. Preliminary proceedings against bank as basis of action against creditors.
 - a. Judgment against bank.
 - b. Where this need not be done.
 - c. Exact indebtedness need not be obtained before proceeding against stockholders.
 - d. Appeals.
- 23. Similarity of preliminary proceedings in cases of unpaid subscriptions and double liability.
- 24. How far is judgment against bank conclusive against stockholders.
- 25. Same subject.
- 26. Parties to creditors' bill.
- 27. Proceedings against foreign stockholders.
 - a. What preliminary action must be taken.
 - b. Non-resident need not have participated.
 - c. When is the statutory remedy exclusive and an objection.
 - d. Forms of remedy and other questions.
 - e. Action of federal courts in exercising comity.
 - f. A co-resident with bank cannot be sued in another state.
- 28. Assessment claim can be sold and assigned.
- 29. Assessment to restore impaired capital.
- 30. Defenses.
- 31. Set off.
 - a. Against unpaid subscription.
 - b. Against assessment.
 - c. Reasons for not allowing.
 - d. Illinois opposed to general rule.

- | | |
|--|---|
| <ul style="list-style-type: none"> e. Set off of preferred debt. f. Equitable set off in federal courts. g. How rule of the forum has been modified. | <ul style="list-style-type: none"> e. Effect of judgment of forfeiture. f. Extension of liability to representatives. |
| <ul style="list-style-type: none"> 32. Duration of liability of home stockholder. <ul style="list-style-type: none"> a. For unpaid stock. b. For assessment of national bank stockholders. c. For state bank stockholders. d. When stockholder's liability is secondary. | <ul style="list-style-type: none"> 33. Duration of liability of foreign stockholders. 34. Liability of stockholders who continue the bank beyond the legal period. 35. Liability of stockholders voluntarily liquidating. 36. Contributions among stockholders. 37. Liability of private banker. |

1. Creditor's Claim is Against Bank While Solvent.

So long as a bank is solvent, its capital belongs to the corporate entity; its creditors have no lien thereon for any indebtedness to them.¹ As their contract is with the bank alone, to that only can they look for redress after failing to observe its obligation. Should it become insolvent, then its entire capital is transformed into a fund on which they can rely for payment.²

2. Stockholders Are Liable for All Capital Subscribed.

Though the stockholders of a bank are not liable at common law to its creditors for the bank's indebtedness,³ they are lia-

¹ McDonald v. Williams, 174 U. S. 397, 401; New Hampshire Sav. Bank v. Richey, 58 C. C. A. 294.

² Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 383, 385. An industrial company has sometimes been authorized to receive deposits and pledge its property as security. Such authority, granted by the legislature, requires action on the part of the company to be effective. The property must be actually pledged by such formal action as will clearly indicate the company's purpose to avail itself of the authority thus granted. When this is done an "equitable lien" is created in favor of the depositor. Newton v. Eagle & Phenix Mfg. Co., 101 Fed. 149. For the liability of stockholders in national banks, see valuable note, 46 C. C. A., 503; for the liability of stockholders in other corporations, see lengthy note, 3 Am. St. Rep. 806.

³ Smith v. Huckabee, 53 Ala. 191, 195; Hightower v. Thornton, 8 Ga. 486; Abbott v. Goodall, 100 Me. 231; Jones v. Jarman, 34 Ark. 323; Mann v. Pentz, 3 N. Y. 415, 422; Nathan v. Whitlock, 9 Paige (N. Y.) 152; Vose

ble to the bank itself for the capital they have subscribed.⁴ Those, therefore, who have not paid the entire amount must pay the remainder,⁵ or so much as may be needed to discharge the bank's obligations.⁶ And any part they may have withdrawn, however honestly, must be returned and devoted to the same purpose.⁷ Besides, whatever may have been the original conditions of payment, these do not bind the bank's creditors.⁸ They may nevertheless expressly waive their right to collect from a stockholder a debt which the bank has failed to pay.⁹ But this oft-desired favor is rarely recorded.

This liability applies only to stockholders purchasing or taking stock directly from the bank. A purchaser in the market for less than par value, which has been fully paid, is not liable.¹⁰

v. Grant, 15 Mass. 505; Spear v. Grant, 16 Mass. 9; Wood v. Dummer, 3 Mason (U. S.) 308. A stockholder who sells his stock before the corporation contracts a debt or completes organizing is not liable. Demelman v. Brown, 23 R. I. 596; Sayles v. Bates, 15 R. I. 342. See §11 (i).

4 Upton v. Tribilcock, 91 U. S. 45; Webster v. Upton, 91 U. S. 65; Sawyer v. Hoag, 17 Wall. (U. S.) 610; Ogilvie v. Knox Ins. Co., 22 How. (U. S.) 380; Haskins v. Harding, 2 Dill. (U. S.) 99, 106; Messersmith v. Sharon Sav. Bank, 96 Pa. 440; Nathan v. Whitlock, 9 Paige (N. Y.) 152; Shickle v. Watts, 94 Mo. 410; Chrisman-Sawyer Bkg. Co. v. Independence Mfg. Co., 168 Mo. 634, 642; Jones v. Jarman, 34 Ark. 323; Hardy v. Norfolk Mfg. Co., 80 Va. 404, 416; Hightower v. Thornton, 8 Ga. 486; Harmon v. Page, 62 Cal. 448; Gainey v. Gilson, 149 Ind. 58.

5 Ibid; Morgan v. New York & Albany R., 10 Paige (N. Y.) 290; Maine Trust & Bkg. Co. v. Southern Loan & Trust Co., 92 Me. 444.

6 Ibid.

7 See Ch. IV. §8. Hastings v. Drew, 76 N. Y. 9. An authorized reduction of stock will relieve stockholders beyond the prescribed amount on subsequent indebtedness. Hepburn v. Exchange Bank, 4 La. Ann. 87; Palfrey v. Paulding, 7 La. Ann. 363; Stark v. Burke, 9 La. Ann. 341.

8 Carnahan v. Campbell, 158 Ind. 226; Thompson v. Reno Sav. Bank, 19 Nev. 171, and 242; Lewis v. Glenn, 84 Va. 947; Upton v. Tribilcock, 91 U. S. 45.

9 Carnahan v. Campbell, 158 Ind. 226; Bush v. Robinson, 95 Ky. 492; Brown v. Eastern Slate Co., 134 Mass. 590; Robinson v. Bidwell, 22 Cal. 379; Young v. Erie Iron Co., 65 Mich. 111; United States v. Stanford, 17 C. C. A. 143. See Kenton Furnace R. v. McAlpin, 5 Fed. 737.

10 Libbey v. Tobey, 82 Me. 397, 405; Maine Trust & Bkg. Co. v. Southern Loan & Trust Co., 92 Me. 444.

3. Liability of Stockholders Who Have Paid in Other Property Than Money.

To stockholders who have paid for their stock in other property than money, different rules have been applied. Happily the courts unite on the principle that the intentional over-valuation of property, given for stock, is a fraud on creditors, who can rightfully hold the stockholders for the true deficiency in the valuation.¹¹

(a.) An excessive valuation by honest mistake, without intention to defraud creditors, is by one view not a wrong that the law ought to recognize;¹² by the other view, creditors can still hold the stockholders for the deficiency.¹³

(b.) The latter view is sustained by the sounder reason. As creditors gave credit to the bank, supposing that the professed or declared amount of stock had been contributed, should any mistake be made, the stockholders who erred, not the creditors who relied thereon, ought to suffer. To apply to them this rule

11 *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 345; *State Trust Co. v. Turner*, 111 Iowa 664; *Richardson v. Treasure Hill Mining Co.*, 23 Utah 366; *Boynton v. Hatch*, 47 N. Y. 225; *Van Cott v. Van Brunt*, 72 N. Y. 535; *National Tube Works Co. v. Gilfillan*, 124 N. Y. 302; *Douglass v. Ireland*, 73 N. Y. 100, 104; *Carr v. Le Fevre*, 27 Pa. 413; *Manhattan Trust Co. v. Seattle Coal Co.*, 16 Wash. 499; *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614; *National Bank v. Ill. & Wis. Lumber Co.*, 101 Wis. 247. See Chap. IV. §6.

12 *National Bank v. Illinois & Wis. Lumber Co.*, 101 Wis. 247; *Whitehill v. Jacobs*, 75 Wis. 474; *Young v. Erie Iron Co.*, 65 Mich. 111; *Turner v. Bailey*, 12 Wash. 634; *Graves v. Brooks*, 117 Mich. 424; *Kelley v. Fletcher*, 94 Tenn. 1; *Douglass v. Ireland*, 73 N. Y. 100; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343; *Rickerson Roller Mill Co. v. Farrell Foundry Co.*, 43 U. S. App. 452. See *Bank v. Alden*, 129 U. S. 372 and *Richardson v. Treasure Hill Mining Co.*, 23 Utah 366 and cases cited.

13 *Elyton Land Co. v. Birmingham Warehouse Co.*, 92 Ala. 407; *Sprague v. National Bank*, 172 Ill. 149; *State Trust Co. v. Turner*, 111 Iowa 664, citing many cases; *Stout v. Hubbell*, 104 Iowa 499; *Dunlap v. Rauch*, 24 Wash. 620; *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614; *Berry v. Rood*, 168 Mo. 316; *Shepard v. Drake*, 61 Mo. App. 134; *Van Cleve v. Berkey*, 143 Mo. 109, which contains an elaborate discussion of the rule and review of cases, and also disapproving of *Woolfolk v. January*, 131 Mo. 620. See Note 42 L. R. A. 591.

is simply to treat them as the law treats others under similar conditions.

(c.) A dealer with a bank, who knows the truth concerning the valuation of its assets at the time of extending his credit, "cannot be heard to complain, for the reason that no credit is given upon a representation of a different set of facts than those which actually existed."¹⁴

(d.) In determining the worth of the property, its value must be considered at the time of devoting it to the payment of the stock; not its greater or lesser value at a subsequent period.¹⁵

4. Stockholders Cannot Question Necessity of Call to Pay Indebtedness.

A stockholder cannot question the necessity for a call by the directors, or other proper officers, to pay any portion still due for the purpose of discharging the bank's indebtedness.¹⁶ And after his death, this liability clings to his estate.¹⁷ As the liability is contingent, the statute of limitations does not begin to run against a call until it has been made,¹⁸ and the same rule applies to an assignee.¹⁹

5. Liability of Stockholders of Partly Paid Stock Issued as Fully Paid.

Occasionally a bank issues, as fully paid, stock for which only a part of the par value has been paid. Concerning the liability of such an owner to creditors, opinion is divided. By one view he is liable for his share of the deficiency, not exceeding

¹⁴ *Bank v. Alden*, 129 U. S. 372; *First Nat. Bank v. Gustin Mining Co.*, 42 Minn. 327; *Walburn v. Chenault*, 43 Kan. 352; *Berry v. Rood*, 168 Mo. 316, 334.

¹⁵ *Richardson v. Treasure Hill Mining Co.*, 23 Utah 366.

¹⁶ *Estate of Fitzgerald v. Union Sav. Bank*, 65 Neb. 97; *Budd v. Multnomah R.*, 15 Or. 413; *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286. See *Kilbreath v. Gaylord*, 34 Ohio St. 315.

¹⁷ *Davis v. Weed*, 44 Conn. 569, 581.

¹⁸ *Priest v. Glenn*, 2 C. C. A. 305; *Dorsheimer v. Glenn*, 2 C. C. A. 309; *Great Western Tel. Co. v. Gray*, 122 Ill. 630; *Marr v. Bank*, 4 Lea (Tenn.) 578; *Kilbreath v. Gaylord*, 34 Ohio St. 305; *Glenn v. Williams*, 60 Md. 93. See §32.

¹⁹ *Priest v. Glenn*, 2 C. C. A. 305; *Marr v. Bank*, 4 Lea (Tenn.) 578.

the full amount;²⁰ by the other view, nothing more can be rightfully demanded.²¹ In support of the latter view, it is said that there is nothing immoral in thus investing stock with a new quality, because creditors contract with the corporation, well knowing the amount of its resources.

(a.) If credit has been given to a bank, supposing that all the stock has been, or will be, paid, or will be demanded to discharge its obligations, then the stockholders may be compelled to pay whatever may be required for this purpose, not exceeding their fixed liability.²² On the other hand, if creditors know that only a portion has been paid, and that the stockholders have determined to contribute no more, and no statutory rule exists requiring stockholders to pay more, no deception is practised, and creditors have no rightful claim for further contributions.²³

(b.) A purchaser or assignee of stock issued as fully paid, though not in truth, which is acquired by him without any knowledge of the fact, is not liable either to the bank,²⁴ or to its creditors,²⁵ for the unpaid portion. But he is not protected by the recital in the certificate he has secured, that the stock is

20 *Fouche v. Merchants' Nat. Bank*, 110 Ga. 827; *Camden v. Stuart*, 144 U. S. 104; *Potts v. Wallace*, 146 U. S. 689; *Richardson v. Green*, 133 U. S. 30; *Scoville v. Thayer*, 105 U. S. 143; *Shields v. Hobart*, 172 Mo. 491; *Sprague v. National Bank*, 172 Ill. 149, 167; *Coleman v. Howe*, 154 Ill. 458; *National Tube Works Co. v. Gilfillan*, 124 N. Y. 302; *Gager v. Paul*, 111 Wis. 638, 648; *Kelly v. Clark*, 21 Mont. 291, containing an elaborate review of the cases on this subject.

21 *Young v. Erie Iron Co.*, 65 Mich. 111.

22 *Bent v. Underdown*, 156 Ind. 516, 518. See *Chrisman-Sawyer Bkg. Co. v. Independence Mfg. Co.*, 168 Mo. 634.

23 *Walburn v. Chenault*, 43 Kan. 352; *Callanan v. Windsor*, 78 Iowa 193; *State Trust Co. v. Turner*, 111 Iowa, 664; *Phelan v. Hazard*, 5 Dill. (U. S.) 45.

24 *Albitztigui v. Guadalupe Mining Co.*, 92 Tenn. 598, 604; *Brant v. Ehlen*, 59 Md. 1; *Young v. Erie Iron Co.*, 65 Mich. 111, 127; *Rood v. Whorton*, 74 Fed. 118, 123; *Steacy v. Little Rock R.*, 5 Dill. (U. S.) 348; *Burkinshaw v. Nicolls*, L. R. 3 App. Cas. 1004; *Waterhouse v. Jamieson*, L. R. 2 H. of L. (Scotch) 29; *Sprague v. National Bank*, 172 Ill. 149, 167; *Coleman v. Howe*, 154 Ill. 458.

25 *Ibid.*

fully paid and non-assessable, when knowing that the statement is not correct.²⁶ On the other hand, an assignee who knows that his stock has been improperly issued as fully paid is liable for the deficiency.²⁷

6. Liability of Bank for Partly Paid Stock Taken for Debt.

Another invasion in this rule has been made in favor of an assignee who has taken stock for a debt. The exception, though easily abused, is founded on a good reason. The stockholder is an unwilling owner; he takes the stock to save his debt, in a sense it is forced on him. Doubtless he would sell at the first opportunity, and usually does so. By the national banking law, he must speedily part with it. In such case the assignee is released, and the assignor is held.²⁸

7. Liability of Subsequent Stockholders of Partly Paid Stock for Debts Incurred Before Transfer.

After the transfer of partly paid stock, who is liable for the balance? The original holder, or assignor of unrecorded stock, is liable for the amount; ²⁹ but he may have a remedy against the assignee.³⁰

If the transfer has been recorded, then one of four consequences follows from the act. (a) In some states the assignor is still liable;³¹ and doubtless in all if the transfer was to a

²⁶ *Fouche v. Merchants' Nat. Bank*, 110 Ga. 827.

²⁷ *Allen v. Grant*, 122 Ga. 552.

²⁸ *Graham v. Platt*, 28 Colo. 421; *Hill v. Graham*, 11 Colo. App. 536.

²⁹ *McKim v. Glenn*, 66 Md. 479, 483; *Hammond v. Strauss*, 53 Md. 1, 15; *Magruder v. Colstan*, 44 Md. 349, 356 and cases cited. And if a broker buys stock for a customer and treats it as his own, he is held by the above rule. *McKim case*, 66 Md. 479.

³⁰ See §18.

³¹ *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, 91 U. S. 65; *Glenn v. Scott*, 28 Fed. 804; *Hamilton v. Glenn*, 85 Va. 901; *McKim v. Glenn*, 66 Md. 479; *Maine Trust & Bkg. Co. v. Southern Loan & Trust Co.*, 92 Me. 444, 451; *Pittsburg & Connelville R. v. Clarke*, 29 Pa. 146; *Neb. Constitution*, Sec. 4, Art. 11b, and *Wyman v. Bowman*, 127 Fed. 257 construing it; *People's Home Sav. Bank v. Rickard*, 139 Cal. 285. By the Nebraska constitution the original subscriber, after the sale of his stock,

worthless person to escape liability for the balance of his stock.³² (b) In others, the assignor is released from liability within a few months after transferring his stock, the period stretching from two months to two years.³³ This rule is simple and can be easily enforced, the only serious question lying in the judicial pathway is in determining the nature of the debts for which the stockholders are still liable.³⁴

(c.) In other states the assignee succeeds to all the rights and liabilities of the assignor.³⁵ By this rule the assignor is divested of all liability after making a bona fide transfer of his stock for the bank's indebtedness, whether contracted before or after his purchase. On the other hand, the assignee purchases his share of all the assets, and assumes his share of all the liabilities. This is the general rule in administering the national banking law,³⁶ and it is so just and simple that it commends itself more and more to the state tribunals.

becomes a guarantor "to pay the unpaid part of the subscription only after the corporate property is exhausted." Wyman case, *supra*. p. 261.

"Equity treats the capital stock of a corporation as a fund for the security of creditors. If the stock is not fully paid at par value, and there is a failure of assets of the corporation to pay its creditors, the stockholders may be compelled to make payment upon his stock to its par, if so much is necessary to pay the debts. This liability may be enforced by the corporation, or by the creditors, but it applies only to parties taking the stock directly from the corporation; a purchaser in the market for less than par value is not liable." Strout, J., *Maine Loan & Bkg. Co. v. Southern Loan & Trust Co.*, 92 Me. 444, 451. See *Libby v. Tobey*, 82 Me. 397.

32 *People's Home Sav. Bank v. Rickard*, 139 Cal. 285; *McConey v. Belton Oil Co.*, 106 N. W. (Minn.) 900; *National Carriage Co. v. Story Com. Co.*, 111 Cal. 531. And if the bank was insolvent, the burden of proof is on the assignor to prove the honesty of the transaction. *Ibid*.

33 *Gager v. Paul*, 111 Wis. 638; *Hyatt v. Anderson*, 74 S. W. (Ky.) 1094; *Gen. Stat. of Ky. 1894, §2501*; *Union Bank v. Wando Mining & Mfg Co.*, 17 S. C. 339; *Wincock v. Turpin*, 96 Ill. 135.

34 See (d) of this section.

35 *Foster v. Row*, 121 Mich. 1; *Latimer v. Citizens' State Bank*, 102 Iowa 162; *McConey v. Belton Oil Co.*, 106 N. W. (Minn.) 900.

36 *Richards v. Attleborough Nat. Bank*, 148 Mass. 187. "The transfer of the stock in a national bank honestly made while the bank is in operation will substitute the transferee for the original stockholder, relieving the latter from his responsibilities, and imposing them on the purchaser." *Devens, J.*, *Ibid* 195.

(d.) Finally, in some states, the assignor is liable for all debts contracted prior to the sale or transfer of his stock, and the assignee for all subsequent indebtedness.³⁷ Wherever this rule prevails, a grave question sometimes arises in fixing the liability begun but not ended during the assignor's ownership. The difficulty of applying it clearly reveals the unwisdom of its existence.³⁸

(e.) The right of a bank to enforce an assessment against the assignor of stock is not affected by his subsequent transfer. The new owner takes the stock subject to the bank's lien. The assessment is against the stock whose identity is not affected by the transfer.³⁹

Again, where the first, second and fourth rules prevail, there is still more refinement in renewals of the bank's indebtedness. In most states a renewal does not affect a stockholder's liability because he is not regarded as a surety, but jointly liable with the corporation;⁴⁰ in other states by an extension without his consent he is released.⁴¹ Thus his liability turns on the answer

37 *New England Com. Bank v. Newport Steam Factory*, 6 R. I. 154; *Morgan v. Brower*, 77 Ga. 627; *Matthews v. Albert*, 24 Md. 527; *Bond v. Appleton*, 8 Mass. 472. See *Wheeler v. Faurot*, 37 Ohio St. 26. See §18.

38 Thus an attorney is employed on the first day of a month and his service is rendered three months afterward. The assignor sells his stock at the end of the first month, and the bank fails within a year. Is the unpaid attorney's debt to be regarded as contracted during the assignor's ownership of the stock, or during the ownership of the assignee? *Johnson v. Bank*, 125 Cal. 6. For other cases, see *Herrick v. Wardwell*, 58 Ohio St. 294, also note 73 Am. St. Rep. 19.

By this rule an assignor is liable for rent on a lease given before, but accruing after the transfer. *Hyatt v. Anderson*, 74 S. W. (Ky.) 1094.

39 *Craig v. Hesperia Land & Water Co.*, 113 Cal. 7; *Hawley v. Brumagim*, 33 Cal. 394; *Atkins v. Gamble*, 42 Cal. 99.

40 *Continental Nat. Bank v. Burford*, 114 Fed. 290, 292; *Boice v. Hodge*, 51 Ohio St. 236; *Taylor v. West Liberty Co.*, 9 Am. Law Rec. (Ohio) 28; *Jackson v. Meek*, 87 Tenn. 69; *Young v. Rosenbaum*, 39 Cal. 646; *Davidson v. Rankin*, 34 Cal. 503; *Mokelumne Mining Co. v. Woodbury*, 14 Cal. 265; *Harger v. McCullough*, 2 Denio (N. Y.) 119; *Hardman v. Sage*, 124 N. Y. 25; *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Hyatt v. Anderson*, 74 S. W. (Ky.) 1094.

41 *Union Bank v. Wando Mining & Mfg. Co.*, 17 S. C. 339; *New England Com. Bank v. Newport Steam Factory*, 6 R. I. 154; *Hardman v. Sage*,

to the question whether his obligation is primary or secondary; one rule exists for all, but on its application the courts have divided.

8. Distinction Between Stockholders' Liability to Bank and to Its Creditors.

Lastly, the distinction should be kept in sight between the liability of the two classes of stockholders just described to their bank and to its creditors. There may be a valid settlement or satisfaction of a subscription as between the bank and a stockholder that would be unavailing against its creditors. For this reason,—that a balance due on unpaid stock is a bank asset which the owner may at any time pay to the bank,—he cannot pay to one creditor to the injury of others.⁴² Indeed, the principle may be applied more widely to all classes of stockholders.⁴³

In another way does the importance of this distinction reveal itself. A stockholder can set off any indebtedness he may have against his bank while solvent in response to its demand for an unpaid subscription;⁴⁴ but after the happening of this event, such a set off against unpaid subscriptions can no longer be interposed.⁴⁵

9. Remedy to Recover Unpaid Subscriptions.

The remedy generally employed to recover unpaid stock is a bill in equity, brought by one or more creditors for the benefit of all,⁴⁶ though on a few occasions an action at law has

124 N. Y. 25; *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Parrott v. Colby*, 6 Hun 55, *affd.* 71 N. Y. 597.

42 *Welch v. Sargent*, 127 Cal. 72.

43 *Camden v. Stuart*, 144 U. S. 104, 113, 114. Cases in §5, note 5; *Scovill v. Thayer*, 105 U. S. 143, 153, 154; *Fouche v. Merchants' Nat. Bank*, 110 Ga. 827. See §31 c.

44 *Barnett's Case*, L. R. 19 Eq. 449. See *Bausman v. Denny*, 73 Fe.l. 69 and 1 *Cook on Corp.* §193.

45 See §31 a.

46 *Hatch v. Dana*, 101 U. S. 205; *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380; *Marsh v. Burroughs*, 1 Woods (U. S.) 468; *Wood v. Dummer*, 3 Mason (U. S.) 308; *Briggs v. Penniman*, 8 Cow. (N. Y.) 387; *Mann v.*

been sustained.⁴⁷ An assignee or receiver has unquestioned authority to make these collections,⁴⁸ though in some jurisdictions he must base his action on a special order obtained from proper authority.⁴⁹ By statute, directors may have authority to make assessments on unpaid stock to satisfy the claims of creditors.⁵⁰ If the bank is solvent, then the bank itself proceeds against delinquents.⁵¹

To justify action by creditors against the stockholders, they must proceed against the bank and fail to obtain a satisfaction of their judgment.⁵² The declared insolvency of a bank, however, is adequate proof of its inability to respond to the demands of its creditors to justify their equitable procedure.⁵³

Pentz, 3 N. Y. 415; *Morgan v. New York & Albany R.*, 10 Paige (N. Y.) 290; *Griffith v. Mangam*, 73 N. Y. 611; *Jones v. Jarman*, 34 Ark. 323; *Maine Trust & Bkg. Co. v. Southern Loan & Trust Co.* 92 Me. 444; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Smith v. Huckabee*, 53 Ala. 191; *Lane's Appeal*, 105 Pa. 49.

47 *Bank v. Ibbotson*, 24 Wend. (N. Y.) 473, 479; *Wincock v. Turpin*, 96 Ill. 135; *Schalucky v. Field*, 124 Ill. 617, 621; *Colo. Fuel Co. v. Sedalia Smelting Co.*, 13 Colo. App. 474.

48 *Sagory v. Dubois*, 3 Sand. Ch. (N. Y.) 466; *Pentz v. Hawley*, 1 Barb. Ch. (N. Y.) 122; *Simmons v. Taylor*, 106 Tenn. 729; *Gainey v. Gilson*, 149 Ind. 58; *Chandler v. Keith*, 42 Iowa 99; *Winans v. McKean R.*, 6 Blatchf. (U. S.) 215; *McBryan v. Universal Elevator Co.*, 130 Mich. 111.

49 *Simmons v. Taylor*, 106 Tenn. 729.

50 *Union Sav. Bank v. Leiter*, 145 Cal. 696.

51 *Hartford & New Haven R. v. Kennedy*, 12 Conn. 499; *Stoddard v. Lum*, 159 N. Y. 265, 275.

52 *Wheatley v. Glover*, 54 S. E. (Ga.) 626; *Barrick v. Gifford*, 47 Ohio St. 180. "Unpaid balances on subscriptions cannot be collected unless there is a necessity therefor to pay debts, or in equalizing stockholders in the distribution of the assets on winding up the corporation. Before unpaid subscriptions can be collected, certain conditions must appear—that is, that the other assets have been, or are being collected, and are insufficient to pay the debts. An account must be taken, and an order made in the nature of a call upon stockholders for unpaid subscriptions and this must be made ratably so as to be equal and uniform." *Wilkes, J., Simmons v. Taylor*, 106 Tenn. 729, 740. See §23 for more cases.

53 *Patterson v. Lynde*, 112 Ill. 196; *Barrick v. Gifford*, 47 Ohio St. 180; *First Nat. Bank v. Greene*, 64 Iowa 445; *Latimer v. Citizens' State Bank*, 102 Iowa 162.

Contra.—*Gillin v. Sawyer*, 93 Me. 151.

As we have already seen, if the bank is truly solvent the claims of creditors are against the institution itself, and not against its members.⁵⁴

In such an action the judgment creditors must prove that the stockholders are indebted to the bank for an unpaid portion, as the law presumes that the full amount has been paid.⁵⁵ Beside the unpaid portion, interest also may be recovered of the owner from the time of beginning the action.⁵⁶

10. Foreign Stockholders.

In pursuing foreign stockholders for unpaid subscriptions, the courts have always found the way easy to enforce them, because they have never doubted the nature of such engagements. An unpaid subscription is a simple debt to the corporation; and if not collected during its active existence, its creditors,⁵⁷ or representatives, assignee or receiver,⁵⁸ have almost everywhere been permitted to collect, either fully, or to the extent needful to pay the bank's indebtedness.

More generally stockholders who reside in another state are none the less bound to fulfil their contract of membership. As they expect the bank to treat them in the same manner as it treats its home stockholders, so must they in like manner regard their obligations. If the directors call for payments of stock, they must respond like other stockholders; they have no claim to immunity by reason of their foreign residence.⁵⁹ Their

⁵⁴ See §1.

⁵⁵ *Merrill v. Timbrell*, 123 Iowa 375.

⁵⁶ *Handy v. Draper*, 89 N. Y. 334.

⁵⁷ *Latimer v. Citizens' State Bank*, 102 Iowa 162.

⁵⁸ *Stoddard v. Lum*, 159 N. Y. 265; *Dayton v. Borst*, 31 N. Y. 435; *Fish v. Smith*, 73 Conn. 377; *Mann v. Cooke*, 20 Conn. 178; *Castle v. Templeman*, 87 Md. 546; *Otter View Land Co. v. Bolling*, 70 S. W. (Ky.) 834; *Wyman v. Bowman*, 127 Fed. 257; *Bank v. McLeod*, 38 Ohio St. 174; *Boulware v. Davis*, 90 Ala. 207; *Bagby v. At. M. & Ohio R.*, 86 Pa. 291; *Mitzner v. Bauer*, 98 Ind. 427; *Pugh v. Hurtt*, 52 How. Pr. (N. Y.) 22; *Patterson v. Lynde*, 112 Ill. 196. See note 23 L. R. A. 52.

⁵⁹ *Nashua Sav. Bank v. Anglo-Am. Mortgage Co.* 189 U. S. 221.

rights and liabilities are determined by the law of the state where the bank exists and the contract was made.⁶⁰

Only in a few states does the old doctrine linger, that comity will not permit a foreign receiver to sue for an unpaid subscription.⁶¹ In nearly all, the courts are open to him for this purpose. The states are slower in opening their courts to him for enforcing the double liability of stockholders, though making commendable progress. In both classes of cases the liability of a stockholder is founded on voluntary contract, free from all elements of deceit, and there is no sound reason why a foreign state should aid one of its citizens in escaping from a just obligation, while his associates in the same enterprise living in the home state, where the corporation existed, are required to respond.

Even in the states where a foreign receiver will not be judicially recognized, a creditor may maintain a bill in equity for the benefit of all the creditors against all the stockholders who have not paid their subscriptions.⁶²

11. Liability of Stockholders for Additional Capital. Double Liability.

Besides preserving the capital of a bank as a fund for paying its debts, the national government⁶³ and some of the states⁶⁴ require bank stockholders to contribute as much more, if needed, to pay its indebtedness. This is known in familiar

60 *Glenn v. Liggett*, 135 U. S. 533, citing *Barclay v. Tolman*, 4 Edw. Ch. (N. Y.) 123; *Bank v. Adams*, 1 Parsons Sel. Cases, (Pa.) 534; *Patterson v. Lynde*, 112 Ill. 196.

61 *Wyman v. Eaton*, 107 Iowa 214; *Fitzgerald v. Fitzgerald Construction Co.*, 41 Neb. 374, 407. See Chap. XXX, §19; *Reed v. Burg*, 2 Neb. (Unof.) 117.

62 *Reed v. Burg*, 2 Neb. (Unof.) 117.

63 Rev. Stat. §5151.

64 New York Laws, 1849, Ch. 226; *U. S. Trust Co. v. U. S. Fire Ins. Co.*, 18 N. Y. 199. In Georgia it has been decided that under a charter providing that stockholders shall be held for the balance of their unpaid subscriptions, the law applied solely to the original subscribers and not to their successors, who become so by purchase. *Reid v. De Jarnette*, 123 Ga. 787.

speech as the "double liability" requirement. The nature of this liability will now be explained.

(a.) A stockholder's liability for his stock and assessments thereon is generally regarded as contractual;⁶⁵ by fewer tribunals as statutory; by others as partaking of both elements, the contractual predominating. Says Justice Knowlton: "Although the liability is founded on a statute, there is a contractual element entering into it. The undertaking is as if one subscribing for stock expressly agreed to take and hold it under a previously prepared contract in writing that all who should become holders of the stock should pay the amount of their subscriptions to the corporation when needed, and should pay the additional sum to create a fund for creditors if the corporation should become insolvent and a receiver should be appointed to collect it."⁶⁶

(b.) The law is not penal,⁶⁷ nor local,⁶⁸ therefore the action thereon is transitory and can be enforced in any state where a stockholder lives.⁶⁹ Did it possess a penal character a different rule would apply.⁷⁰

65 *Whitman v. Oxford Nat. Bank*, 176 U. S. 559; *Hawthorne v. Calef*, 2 Wall. (U. S.) 10, 22; *De Weese v. Smith*, 97 Fed. 309; *Myers v. Knickerbocker Trust Co.*, 139 Fed. 111; *Howarth v. Lombard*, 175 Mass. 570, 573; *Broadway Nat. Bank v. Baker*, 176 Mass. 294; *Foster v. Row*, 120 Mich. 1, 23; *Western Nat. Bank v. Lawrence*, 117 Mich. 669; *Cushing v. Perot*, 175 Pa. 66; *Pulsifer v. Greene*, 96 Me. 438; *Childs v. Cleaves*, 95 Me. 498, 509; *Howell v. Manglesdorf*, 33 Kan. 194, 199; *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102; *Paine v. Stewart*, 33 Conn. 516; *Bell v. Farwell*, 176 Ill. 489; *Ferguson v. Sherman*, 116 Cal. 169; *Guerney v. Moore*, 131 Mo. 650; *First Nat. Bank v. Gustin Mining Co.*, 42 Minn. 327; *Hill v. Graham*, 11 Colo. App. 536, 544; *Adams v. Clark*, 85 Pac. (Colo.) 643.

66 *Howarth v. Lombard*, 175 Mass. 570, 574.

67 *Flash v. Conn*, 109 U. S. 371, revg. *Flash v. Conn*, 16 Fla. 428; *Corning v. McCullough*, 1 N. Y. 47; *Lowry v. Inman*, 46 N. Y. 119, 125; *Hawkins v. Furnace Co.*, 40 Ohio St. 507, 514; *Nimick v. Mingo Iron Works*, 25 W. Va. 184, 197; *Hanson v. Davison*, 73 Minn. 454, 460; *Adams v. Clark*, 85 Pac. (Colo.) 642.

Contra.—*Woods v. Wicks*, 7 Lea (Tenn.) 40.

68 *Pulsifer v. Greene*, 96 Me. 438.

69 *Pulsifer v. Greene*, 96 Me. 438; *Ferguson v. Sherman*, 116 Cal. 169. See ante note 65 for more cases.

(c.) Without a penal element, the law should be construed like any other statute pertaining to a contractual obligation.⁷¹ More than once the laws imposing this liability have received a strict construction because they were considered as partaking of a penal nature. The better view has been thus expressed by the Supreme Court of Alabama:⁷² "They should be construed neither liberally, nor strictly, but *reasonably*, so as to carry out the clear purpose and policy for which they are enacted." As the statute is free from any penal element,—the stockholder incurring a purely voluntary engagement from which he derives his full measure of advantage,—the creditor is entitled to the same consideration as himself. By thus extending voluntarily his responsibility, his bank gains wider credit, transacts more business, reaps larger profits.

(d.) The courts have sometimes declared that the double liability of a stockholder was secondary.⁷³ This conception is the older and narrower view. Stockholders are now regarded rather as independent, original debtors, and not as sureties with the peculiar rights attaching to that relation.⁷⁴ They

70 *Derrickson v. Smith*, 27 N. J. Law 166; *First Nat. Bank v. Price*, 33 Md. 487. See *Woods v. Wicks*, 7 Lea (Tenn.) 40.

71 *Lowry v. Inman*, 46 N. Y. 119. See *Chase v. Lord*, 77 N. Y. 1.

72 *McDonnell v. Ala. Gold Life Ins. Co.*, 85 Ala. 401, 408.

73 *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102, but see *Sterne v. Atherton*, 7 Kan. App. 20 and *Dawson v. Sholley*, 4 Kan. App. 367; *Hicks v. Burns*, 38 N. H. 141, 145; *Pfaff v. Gruen*, 92 Mo. App. 560; *Wright v. McCormack*, 17 Ohio St. 86; *Umsted v. Buskirk*, 17 Ohio St. 113; *Brown v. Hitchcock*, 36 Ohio St. 667; *Wheeler v. Faurot*, 37 Ohio St. 26; *Mason v. Alexander*, 44 Ohio St. 318; *Harpold v. Stobart*, 46 Ohio St. 397; *Jacobson v. Allen*, 12 Fed. 454; *National Bank v. Dillingham*, 147 N. Y. 603, 611; *Gause v. Boldt*, 49 N. Y. Misc. 340, 344. See *Hirshfeld v. Bopp*, 145 N. Y. 84, affg. 81 Hun 555.

74 *Foster v. Row*, 121 Mich. 1, 9; *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557, 561; *Paine v. Stewart*, 33 Conn. 516; *Coleman v. White*, 14 Wis. 700; *Gianella v. Bigelow*, 96 Wis. 185; *Booth v. Dear*, 96 Wis. 516, 519; *Rehbein v. Rahr*, 109 Wis. 136, 151; *Culver v. Third Nat. Bank*, 64 Ill. 528; *Buchanan v. Meisser*, 105 Ill. 638; *Mitchell v. Beckman*, 64 Cal. 117. See *Young v. Rosenbaum*, 39 Cal. 646; *Bank v. Nias*, 16 Q. B. (N. S.) 717; *Copin v. Adamson*, L. R. 9 Ex. 345.

"The liability of the stockholders is primary and absolute, and attaches the moment the debt is contracted by the bank; it is a liability of all the

are more like partners with a limited liability; no one would think after exhibiting the assets of a partnership and still later of calling on the individual partners for the deficiency, that their liability was secondary. It is conditional, and this is precisely the liability of a stockholder wherever the double liability exists.

The same opinion is maintained concerning the liability of national bank stockholders. "Every creditor of the bank, becoming such, becomes *eo instante*, a creditor of the shareholder in respect to the liability in question. The shareholder becomes thereby a principal debtor. The debt of the bank is his debt at the instant of its creation."⁷⁵

(e.) This liability is purely personal; no one is obliged to pay more by reason of the delinquency of another.⁷⁶ A similar construction is given to the national banking law.⁷⁷

stockholders to all the creditors on the principle of copartnership, the stockholders standing on substantially the same footing as though they were partners or an incorporated association, save only that the responsibility of each is limited to a sum equal to his share or shares of stock." Dixon, C. J., *Merchants' Bank v. Chandler*, 19 Wis. 434, 437. In one of the latest opinions the court said: "This obligation is to the corporation in trust for the security of its creditors. It is difficult to see in what respect it differs from the promise to pay the amount of his stock, so far as the right of the creditor is concerned, except in the order of liability. The corporation may not, as against creditors or other stockholders, relieve him from the obligation. *Foundry Co. v. Killian*, 99 N. C. 501. The corporation, or those representing or succeeding to its rights and remedies, should collect all unpaid subscriptions before resorting to the additional statutory liability. The receiver represents and, in a certain sense, succeeds to the rights of the corporation." *Smathers v. Bank*, 135 N. C. 410, 414.

⁷⁵ *Blatchford, J., Hobart v. Johnson*, 8 Fed. 493, 495.

⁷⁶ *Rehbein v. Rahr*, 109 Wis. 136; *In re Hollister Bank*, 27 N. Y. 393; *Crease v. Babcock*, 10 Met. (Mass.) 525, 555; *Brown v. Merrill*, 107 Cal. 446; *First Nat. Bank v. Winona Plow Co.*, 58 Minn. 167; *Hanson v. Davison*, 73 Minn. 454; *Brundage v. Monumental Granite Co.*, 12 Or. 322; *Umsted v. Buskirk*, 17 Ohio St. 113, 118; *Maine Trust & Bkg. Co. v. Southern Loan & Trust Co.*, 92 Me. 444; *Brunswick Terminal Co. v. National Bank*, 112 Fed. 813; *Hatch v. Dana*, 101 U. S. 205; *Union Nat. Bank v. Halley*, 104 N. W. (S. Dak.) 213.

⁷⁷ *United States v. Knox*, 102 U. S. 422; *Kennedy v. Gibson*, 8 Wall. (U. S.) 498, 505; *Stanton v. Wilkeson*, 8 Bened. (U. S.) 357, 362; *Bailey*

This is the more general law. But in some cases⁷⁸ by statute stockholders are liable to the par value of their stock for the debts of their bank, thus making them liable to a limited amount "as though they were partners."⁷⁹ Wherever such a rule of liability prevails, those who are solvent may be required by a court of equity to make good the shortcomings among their number, each paying such a proportion of the whole debt as his stock bears to the whole amount owned by the solvent stockholders.⁸⁰

(f.) By the national banking law either the receiver, or the creditors of the failed bank, can enforce the double liability,⁸¹ but both cannot at the same time start proceedings against the stockholders.⁸²

When the mode of procedure has not thus been positively prescribed, the creditors generally have been regarded as the proper party, because the fund, so the courts have said, is exclusively for their benefit.⁸³

v. Sawyer, 4 Dill. (U. S.) 463; Young v. Wempe, 46 Fed. 354; Lease v. Barschall, 106 Fed. 762; Wheelock v. Kost, 77 Ill. 296, 300.

78 N. H. Act, 1846. In Missouri a stockholder's liability is expressly limited by constitution to the full amount subscribed. Gausen v. Buck, 68 Mo. 545; Schricker v. Ridings, 65 Mo. 208; Kansas Constitution, Art. XII, §2. Howell v. Manglesdorf, 33 Kan. 194, 199.

79 Zang v. Wyant, 25 Colo. 551; Erickson v. Nesmith, 46 N. H. 371, citing Allen v. Sewall, 2 Wend. (N. Y.) 327; Moss v. Oakley, 2 Hill (N. Y.) 265; Bailey v. Bancker, 3 Hill 188; Corning v. McCullough, 1 N. Y. 47; Harger v. McCulloch, 2 Denio (N. Y.) 123; Abbott v. Aspinwall, 26 Barb. (N. Y.) 202; Southmayd v. Russ, 3 Conn. 52; Middletown Bank v. Magill, 5 Conn. 28; Marcy v. Clark, 17 Mass. 330; Thayer v. Union Tool Co., 4 Gray (Mass.) 75. See Moss v. Averell, 10 N. Y. 449.

80 Ibid.

81 U. S. Rev. Stat. §5151. Richmond v. Irons, 121 U. S. 27; King v. Pomeroy, 121 Fed. 287, 292. See Bolles on National Bank Act, §§176-202, and Supp. §§160-213.

82 Harvey v. Lord, 11 Biss. (U. S.) 144.

83 Runner v. Dwiggins, 147 Ind. 238; Wright v. McCormack, 17 Ohio St. 86; Wincock v. Turpin, 96 Ill. 135; Farnsworth v. Wood, 91 N. Y. 308; Pfohl v. Simpson, 74 N. Y. 137; Zang v. Wyant, 25 Colo. 551; Minneapolis Paper Co. v. Swinburne Printing Co., 66 Minn. 378; Smith v. Huckabee, 53 Ala. 191; Strauss v. Denny, 95 Md. 690; Terry v. Little, 101 U. S. 216;

(g.) This double liability is outside the unpaid balance, if there be any, on one's stock; it is an additional sum equal to the par value of the same.⁸⁴ Nor will a creditor's lack of knowledge concerning the full or partial payment of a bank's stock at the time of extending payment affect the liability of members for their additional liability.⁸⁵

(h.) While interest may continue on the claim of a creditor against a bank after its failure,⁸⁶ none accrues by the national banking law on an assessment until the date of the order. "Otherwise there would be no motive to pay promptly, and no equality between those who should pay then and those who should pay at the end of a protracted litigation."⁸⁷ After that date by the federal rule interest begins to accumulate against those who refuse to heed the order.⁸⁸ Among the state jurisdictions some courts follow the federal rule,⁸⁹ others do not hold the stockholders for interest until their liability has been

Jacobson v. Allen, 12 Fed. 454; New Hampshire Sav. Bank v. Richey, 121 Fed. 956. See §21.

84 Zang v. Wyant, 25 Colo. 551; Pettibone v. McGraw, 6 Mich. 441; Root v. Sinnock, 120 Ill. 350; Lane's Appeal, 105 Pa. 49; McDonnell v. Ala. Gold Leaf Life Ins. Co., 85 Ala. 401; Smith v. Huckabee, 85 Ala. 401.

85 Sprague v. National Bank, 172 Ill. 149.

86 Zang v. Wyant, 25 Colo. 551, 561; Cumberland Lumber Co. v. Clinton Hill Lumber Co., 54 At. (N. J. Eq.) 452; Knowles v. Sandercock, 107 Cal. 629; Wells, Fargo & Co. v. Enright, 127 Cal. 669; McGowan v. McDonald, 111 Cal. 57.

87 Casey v. Galli, 94 U. S. 673, 677; Bowden v. Johnson, 107 U. S. 251; Davis v. Watkins, 56 Neb. 288.

88 Ibid.

89 Burr v. Wilcox, 22 N. Y. 551; Mahoney v. Bernhard, 45 App. Div. 499; *affd.* 169 N. Y. 589; Mason v. Alexander, 44 Ohio St. 318, 336; Taylor v. West Liberty Wheel Co., 9 Am. Law Rec. (Ohio) 28; Senn v. Levy, 111 Ky. 318; Cleveland v. Burnham, 64 Wis. 347, 360; Millisack v. Moore, 76 Mo. App. 528. The indebtedness covered by the double liability includes interest on the balances due depositors from the time of closing the bank to the payment of the last dividend. Parker v. Adams, 38 N. Y. Misc. 325; Richmond v. Irons, 121 U. S. 64. In Georgia interest may be recovered on the amount due by each stockholder from the date of filing the suit against him. Wheatley v. Glover, 54 S. E. 626. See McGowan v. McDonald, 111 Cal. 57.

fully determined.⁹⁰ The federal rule is based on the sounder reason.

(i.) There can be an assessment of fully paid stock only by positive law,⁹¹ which is valid.⁹² If therefore an assessment is imposed on the stockholders of a consolidated bank which has not been legally organized, it cannot be enforced.⁹³

(j.) The double liability of a stockholder is only for the indebtedness of the bank; it does not include every species of liability growing out of official misconduct. It doubtless covers every liability based on contract; but no liability founded on tort.⁹⁴ Suppose a bank had been subjected to a penalty for the neglect of its officers to pay its taxes, or make a report within a prescribed period, this would not be a debt for which the stockholders could be held within the statute.⁹⁵ Furthermore, obligations given to another bank that has assumed its indebtedness, which have not been discharged, are included by the national statute.⁹⁶

(k.) The law has no retroactive effect; and no by-law or stock certificate can affect its construction.⁹⁷

(1) The liability is for the benefit of all the creditors. "This being the nature and character of the liability," says Chief

90 *Munger v. Jacobson*, 99 Ill. 349; *Cole v. Butler*, 43 Me. 401; *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. (S. C.) 225.

91 *United States v. Stanford*, 161 U. S. 413, 429, and cases cited; *Buenz v. Cook*, 15 Colo. 38; *Chase v. Lord*, 77 N. Y. 1; *Slee v. Bloom*, 19 Johns. (N. Y.) 456, 477; *Coffin v. Rich*, 45 Me. 507; *Gray v. Coffin*, 9 Cush. (Mass.) 192; *French v. Teschemaker*, 24 Cal. 518, 540; *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642; *Wheatley v. Glover*, 54 S. E. (Ga.) 626. See §2.

92 *Boor v. Tolman*, 113 Ill. App. 322.

93 *Ibid.*

94 *Brown v. Trail*, 89 Fed. 641. See *Chase v. Curtis*, 113 U. S. 452. A receiver of a national bank is not liable for damages sustained by a person on account of fraud practiced on him by the bank's officers in inducing him to purchase its stock. *Lantry v. Wallace*, 182 U. S. 536.

95 *Miller v. White*, 50 N. Y. 137.

96 Rev. Stat. §5151; *Wyman v. Wallace*, 201 U. S. 230, affg. 68 C. C. A. 40.

97 *Barnes v. Arnold*, 45 N. Y. App. Div. 314; *Hubbell v. Houghton*, 86 Fed. 547, 549; *Sibley v. Quinsigamond Nat. Bank*, 133 Mass. 515, 520.

Justice Brickell, "no single creditor can be permitted to appropriate it to his satisfaction, to the exclusion of the other creditors, who are equal in right and equity to him."⁹⁸

(m.) Stockholders cannot be assessed for any loss caused by the receiver in making investments, or otherwise administering the estate.⁹⁹

(n.) An assessment on the estate of an insolvent stockholder is not entitled to preferential payment over the claims of other creditors of the estate.¹

12. Legality of Statute Imposing or Removing Double Liability.

A statute imposing double liability on the stockholders of a corporate bank, whose charter is subject to legislative amendment, violates no fundamental law. Nor has a single stockholder, who is unwilling to assume the liability, the right to demand its dissolution. But a majority would have the right to take such action.² The law, however, cannot apply to past or existing indebtedness, only to that incurred after imposing the liability.³ On the other hand, a statute may be repealed,

⁹⁸ *Smith v. Huckabee*, 53 Ala. 191, 196; *Welch v. Sargent*, 127 Cal. 72.

Contra.—*Union Nat. Bank v. Halley*, 104 N. W. (S. Dak.) 213; *Buchanan v. Meisser*, 105 Ill. 638, 643. In this case the court also declares that a voluntary payment to a creditor who has the right to sue and recover from the stockholder is valid. But he could not pay to a creditor that was a firm of which he was a member, as the firm could not maintain an action against him.

⁹⁹ *Lease v. Barschall*, 106 Fed. 762.

¹ *Beard's Estate*, 7 Wy. 104.

² *Williams v. Nall*, 108 Ky. 21; *Sherman v. Smith*, 1 Black (U. S.) 587; *In re Empire City Bank*, 18 N. Y. 199; *In re Lee's Bank*, 21 N. Y. 9; *In re Reciprocity Bank*, 22 N. Y. 9; *Barnes v. Arnold*, 23 N. Y. Misc. 197, 207, *affd.* 169 N. Y. 611; *Hagmayer v. Alten*, 36 N. Y. Misc. 59; *Hagmayer v. Farley*, 23 N. Y. App. Div. 426; *McGowan v. McDonald*, 111 Cal. 57; *Bissell v. Heath*, 98 Mich. 472; *Meadow Dam Co. v. Gray*, 30 Me. 547; *Sleeper v. Goodwin*, 67 Wis. 577; *State v. Union Stock Yards State Bank*, 103 Iowa 549. The individual liability of a stockholder in California for his proportionate share of the bank's indebtedness is created by the constitution. Art. 12, §3, and Civil Code §322; *Reddington v. Cornwell*, 90 Cal. 49; *Jones v. Goldtree*, 142 Cal. 383; also in Nebraska, Sec. IV. Art. 11 b.

³ *Barnes v. Arnold*, 23 N. Y. Misc. 197, *affd.* 169 N. Y. 611; *Hagmayer*

removing the double liability of all stockholders of future corporations and also for all future debts of existing corporations.⁴

Again, a change in the remedy, withholding the right of each creditor to pursue the stockholders separately, and substituting a bill in equity to be brought by one or more creditors in behalf of all, has been condemned as impairing the constitutional rights of creditors acquired before the remedial change had been effected.⁵

13. Triple Liability of Stockholders.

A few states have imposed on their stockholders a liability "to double the amount of stock" held by them for the debts of their companies. The requirement has been construed as holding them for double the amount of the par value of their stock in addition to their original contribution.⁶ But interest thereon is not recoverable.⁷

14. Real Holder is Liable.

By the modern law, the real,⁸ not the apparent holder is liable. The holder of record is presumed to be the real holder,⁹

cases, 36 N. Y. Misc. 59 and 23 N. Y. App. Div. 426. In Minn. the double liability was repealed in 1895. Laws, 1895, Ch. 145.

4 2 Bates Anno. Ohio Stat. §3258, p. 1850. The law became effective in Ohio after Nov. 23, 1903.

5 Myers v. Knickerbocker Trust Co., 139 Fed. 111.

6 Zang v. Wyant, 25 Colo. 551; Adams v. Clark, 85 Pac. (Colo.) 642; McCarthy v. Lavasche, 89 Ill. 270; Munger v. Jacobson, 99 Ill. 349; Harper v. Carroll, 66 Minn. 487; Allen v. Walsh, 25 Minn. 543; State v. Bank of New England, 70 Minn. 398; Appeal of Parish, 19 At. (Pa.) 569; Terry v. Little, 101 U. S. 216; Driesbach v. Price, 133 Pa. 560; Paine v. Stewart, 33 Conn. 516; Murphy v. Wheatley, 63 At. (Md.) 62; Richmond v. Irons, 121 U. S. 27, 64, 22.

7 Munger v. Jacobson, 99 Ill. 349; Adams v. Clark, 85 Pac. (Colo.) 642.

8 Pauly v. State Loan & Trust Co., 165 U. S. 606; National Bank v. Case, 99 U. S. 628, 631; U. S. Trust Co. v. U. S. Ins. Co., 18 N. Y. 199, 224, 225; Gilmore v. Bank, 8 Ohio 62, 71; Taylor v. West Liberty Wheel Co., 9 Am. Law Rec. (Ohio) 28; Hulitt v. Ohio Valley Nat. Bank, 137 Fed. 461.

9 Earle v. Carson, 188 U. S. 42; Turnbull v. Payson, 95 U. S. 418, 421; Finn v. Brown, 142 U. S. 56; Sherwood v. Ill. Trust & Sav. Bank, 195

unless some statute prescribes a different rule. The truth may be shown, and the courts admit all proper evidence bearing on the inquiry.¹⁰ And the presumption may be fully overcome by oral evidence that the recorded stockholder refused to accept any stock in the company.¹¹

Again, the above rule has a weaker application "where death has closed the mouth of the alleged shareholder, and his estate is deprived of the evidence of the only witness who could rebut the presumption of ownership raised by the entry."¹² Every

Ill. 112; *Holland v. Duluth Iron Co.*, 65 Minn. 324; *Hoppin v. Buffum*, 9 R. I. 513; *Hoagland v. Bell*, 36 Barb. (N. Y.) 57; *Kerr v. Urie*, 86 Md. 72; *Mudgett v. Horrell*, 33 Cal. 25.

10 *Earle v. Carson*, 188 U. S. 42; *Williams v. American Nat. Bank*, 56 U. S. App. 316; *Burgess v. Seligman*, 107 U. S. 20, 28; *May v. Genesee Co. Sav. Bank*, 120 Mich. 330; *Fouche v. First Nat. Bank*, 110 Ga. 827; *Matthews v. Albert*, 24 Md. 527. "It has been said by some courts that a corporation's stock books are, in all cases, evidence in its favor to show that those whose names it has entered as stockholders are such in fact. This doctrine rests on no solid principle. But, where the relation of a shareholder has been otherwise shown to exist, the books of the corporation become admissible to aid in determining when it commenced, and what, if anything, has been paid in upon the shares. Shareholders in a moneyed corporation, by their contract of membership, constitute it their agent to keep such stock books as are usually kept by similar organizations; and the entries made in due course of business are admissible against them, though not conclusive." *Baldwin, J., Fish v. Smith*, 73 Conn. 377, 391.

11 *Mudgett v. Horrell*, 33 Cal. 25.

12 *Foot v. Anderson*, 123 Fed. 659; *Hinsdale Sav. Bank v. New Hampshire Bkg. Co.*, 59 Kan. 716; *Sigua Iron Co. v. Greene*, 88 Fed. 207; *Hayden v. Williams*, 96 Fed. 279; *Carey v. Williams*, 25 C. C. A. 227; *National Express Co. v. Morris*, 15 App. (D. C.) 262. See also criticisms in the two cases last cited of *Turnbull v. Payson*, 95 U. S. 418 and *Hoagland v. Bell*, 36 Barb. (N. Y.) 57. "Entries in the books of a private corporation are made by its officers, and concern nobody but the corporation and its members. If membership in a corporation be admitted, the books kept by its officers, with some exceptions, are admissible in evidence against the member; but they are not admissible to establish even *prima facie* the fact of membership, as against one protesting his lack of connection with the company. As to him such books are hearsay of the baldest kind. A stock subscription book, in which one has entered his name as a subscriber for corporate shares, would constitute a contract receivable in evidence upon the issue of membership in the corporation; but a mere entry of his name as a subscriber, made upon the books by the secretary or other officer, can be

one knows that stocks are bought and sold, given away, and otherwise transferred, though not immediately on the books, perhaps never, or not for a long time afterward.

(a.) So long as a bank is solvent there is no restriction save the rights of the bank as a lieenee, or of another as a pledgee or garnishee, on a stockholder's right to transfer his stock as he wishes. But, after learning of the insolvency of his bank, he cannot transfer his stock to an insolvent or irresponsible person and thus relieve himself from liability.¹³ Yet the name of many an irresponsible individual has appeared on the books of a bank as a stockholder during impending insolvency. In every case of this kind after discovering the truth, the real holder remains bound.¹⁴ On the other hand, a sale made in good faith, the vendor neither knowing nor suspecting the bank's insolvency, though it really was in that condition, is not fraudulent, and relieves the vendor from all liability.¹⁵ In

viewed in no other light than as the declaration of the corporation or the officer." *Doster, Ch. J., Hinsdale Sav. Bank v. New Hampshire Bankg. Co.*, 59 Kan. 716, 717.

13 *Welch v. Sargent*, 127 Cal. 72, 78. See Chap. IV. §13. There can be no transfer after insolvency is declared. See Chap. XXIX. §12. By the construction of the banking laws of New York, §§52, 53, Laws of 1892, "The transfer of stock, in order to be effectual in relieving the transferor from liability for the debts of the corporation, must not only be made in good faith and without any intent to evade his liability as a stockholder, but must be made while the corporation is solvent." *Persons v. Gardner*, 98 N. Y. Supp. 807, 809.

14 *Paine v. Stewart*, 33 Conn. 516; *McClaren v. Franciscus*, 43 Mo. 452; *Miller v. Great Republic Ins. Co.*, 50 Mo. 55, 57; *Simmons v. Dent*, 16 Mo. App. 288, 294; *Messersmith v. Sharon Sav. Bank*, 96 Pa. 440; *Wehrman v. Reakert*, 1 Cin. Super. Ct. 230; *Parker v. Carolina Sav. Bank*, 53 S. C. 583. National Bank cases—*National Bank v. Case*, 99 U. S. 628; *Bowden v. Johnson*, 107 U. S. 251; *Stuart v. Hayden*, 169 U. S. 1; *Matteson v. Dent*, 176 U. S. 521, 531; *McDonald v. Dewey*, 202 U. S. 510; *Lincoln v. Foster*, 45 U. S. App. 623; *Cox v. Montague*, 47 U. S. App. 384; *Earle v. Carson*, 188 U. S. 42, 49; *Davis v. Stevens*, 17 Blatchf. (U. S.) 259. A, shortly before the failure of a national bank of which his son was a director, sold his stock to him, the son promising, but neglecting to have it transferred before the bank's failure. He was regarded prima facie as the father's agent to make the transfer, moreover the transfer was not made in good faith, for the bank was insolvent. *Schofield v. Twining*, 127 Fed. 486.

15 *Earle v. Carson*, 188 U. S. 42; *Whitney v. Butler*, 118 U. S. 655.

showing the fraudulent nature of a transfer, the burden of proof is on the attacking party.¹⁶

A fraudulent vendor's liability has been recently modified in a manner too important to pass without notice. He does not, after the declared insolvency of the bank, become liable for his share of the entire indebtedness, but only for his share of that portion of its present indebtedness which was in existence at the time of selling his stock.¹⁷

As the liability of a stockholder is fixed by his known insolvency of his bank, surely a transfer after it has gone into liquidation¹⁸ does not in any way affect his liability. Of course, he may make any agreement he may please with the transferee, but this will not change his liability to respond to the bank's creditors.

To establish the liability of the transferor three things must be shown: the insolvency of the bank at the time of making the sale; his knowledge of the fact; and lastly the transfer to one who was unable to respond to the assessment, and whose financial condition either was, or ought to have been known by the seller.¹⁹

(b.) A husband who transfers in good faith his stock to his wife, in a state where such transactions between them are lawful, thereby relieves himself of liability.²⁰

This case was "wrongly decided," so the court said in *Earle v. Carson*, 188 U. S. p. 52, 53. *Kirtley v. Shinkle*, 69 S. W. (Ky.) 723; *Miller v. Great Republic Ins. Co.*, 50 Mo. 55; *Hunt v. Doran*, 92 Minn. 423.

16 *Sykes v. Holloway*, 81 Fed. 432; *McDonald v. Dewey*, 202 U. S. 510.

17 *Muir v. Citizens' Nat. Bank*, 39 Wash. 57; *Bowden v. Johnson*, 107 U. S. 251; *Schraeder v. Manufacturers' Nat. Bank*, 133 U. S. 67; *Irons v. Manufacturers' Nat. Bank*, 17 Fed. 308; *Crease v. Babcock*, 23 Pick. (Mass.) 334.

18 *McDonald v. Dewey*, 202 U. S. 510, revg. in part 67 C. C. A. 408.

19 *McDonald v. Dewey*, 67 C. C. A. 408, affd. 202 U. S. 510.

20 *Simmons v. Dent*, 16 Mo. App. 288. See *O'Connor v. Witherby*, 111 Cal. 523. A husband who subscribes for stock for the benefit of the community renders the community liable for the double liability. *Shuey v. Adair*, 24 Wash. 378. Evidence that a wife who transferred her stock to her daughter just before the failure of the bank, never transacted business

(c.) Stockholders of reorganized banks have sought to escape on the ground of release resulting from reorganization. Rarely have they succeeded.²¹ Suppose an insolvent bank reorganizes, some of the stockholders decline to enter the new organization, and after a short period it fails, what are the rights and liabilities of the parties? The creditors of the old bank lose none of their rights, even though they have accepted in payment certificates of deposit issued by the new organization. As the new bank received all the assets, it is responsible for all the debts, and also its stockholders, before the old stockholders, who did not join in the new organization, can be held for any portion.²²

without advising with her husband, and that he knew of the embarrassed condition of the bank, was not enough to prove a fraudulent transfer. *Sykes v. Holloway*, 81 Fed. 432.

²¹ *Senn v. Levy*, 111 Ky. 318; *Michigan Trust Co. v. Comstock*, 123 Mich. 689. See Chap. II, §1. The stockholders of a Minnesota savings bank that was afterward changed to a guaranty association, did not continue their double liability to creditors. *State v. Savings Bank*, 87 Minn. 473.

A and B, who were conducting a private bank, organized a corporate bank of which they retained the controlling interest. Notes were taken from some of the stockholders for the amount of their stock. Each was held liable for his unpaid stock, and also a sum equal to its par value for all the liabilities accruing while he was a stockholder. *Porter v. Sherman Co. Bkg. Co.*, 36 Neb. 271.

²² *Willius v. Mann*, 91 Minn. 494. In this case the judgment of the court approving of the reorganization provided that it should not release any of the stockholders from liability. Nevertheless it was not effective against those who were not parties to the proceedings and did not become members of the new bank. In *Thompson v. Gross*, 106 Wis. 34, an insolvent bank was reorganized, the stockholders contributing new capital, many of the creditors also taking stock for a still larger amount. The remaining assets were released by the receiver and the bank resumed business. It was discovered that more money was needed to pay the debts, and as the stockholders would pay no more, the bank again failed and the receiver brought an action to enforce the agreement. It was determined that the stockholders who paid were to that extent discharged of their statutory liability to creditors, that there was a sufficient consideration for the agreement, that the receiver was the proper party to sue, and that the creditors who did not join in the agreement were not in any way affected by it. See §36 and Chap. II, §1.

(d.) The real owner, who is liable for the bank's indebtedness, may not hold the same relationship to the vendor or other party. In other words, the real holder for the purpose of assessment may not be the real holder in his relation to another to whom he may have sold the stock, without making for some reason, either good or bad, a transfer.²³

(e.) In some states the legislature has sought to make an inflexible rule, declaring the holder of record the real holder and liable accordingly for the bank's indebtedness.²⁴ It is quite impossible to execute such a statute in the bald manner implied by its language.²⁵ As we have seen, when the holder is an irresponsible person to whom the stock has been transferred to escape liability, the law promptly fastens itself on the real owner.

(f.) The liability of a transferor who has acted without the transferee's knowledge, either with an unworthy motive to escape liability, or with a worthy motive, to make a gift, still continues. But if the transferee knows of the transfer, and takes no immediate action to disclaim his apparent ownership, he will be liable.²⁶

Within this rule may be put a stockholder of record through the mistake of a bank officer. Thus a pledgee directed a bank of-

23 *O'Connor v. Witherby*, 111 Cal. 523; *Shellington v. Howland*, 53 N. Y. 371.

24 In Ohio it has been recently declared that the stockholders whose names appear on the stockbook are subject to the liability prescribed by statute. "The public has a right to rely upon the statute, and are entitled to its provisions, or its full equivalent." *Herrick v. Wardwell*, 58 Ohio St. 294, 313, but see §12; *Shellington v. Howland*, 63 N. Y. 371.

See remark in *Dunn v. Howe*, 107 Fed. 849, 850.

26 *Mudgett v. Horrell*, 33 Cal. 25; *Finn v. Brown*, 142 U. S. 56; *Whitney v. Butler*, 118 U. S. 655; *Keyser v. Hitz*, 133 U. S. 138; *O'Connor v. Witherby*, 111 Cal. 523, 529; *Stephens v. Follett*, 43 Fed. 842; *Dunn v. Howe*, 107 Fed. 849, 850. This rule does not apply to an assignment of untransferred shares delivered to the assignee simply for sale. *Hawkins v. Citizens' Investment Co.*, 38 Or. 544. See Chap. IV. §14, note 8, for more cases. Though a stockholder may be required by statute to give notice of the sale of his stock, and is a holder for a specified period afterward, his liability ceases from the time of making the transfer. *Lane v. Morris*, 1 Ga. 468; *McDougald v. Bellamy*, 18 Ga. 411.

ficer to transfer stock to him as pledgee. Instead of complying, he made an absolute transfer without the pledgee's knowledge. As the pledgee was not responsible for the error, he was exempt from attachment by a statute relieving the holders of collateral from liability.²⁷

(g.) Besides the cases mentioned in which the record does not disclose the truth, are two other classes in which the real ownership is kept in another's name. In the first class the record is intentionally kept by the true owner in the name of another; in the other class the vendor supposes the record has been changed, but for some reason this has not been done.

(g. 1.) The first class of cases relate especially to brokers who purchase stock for their customers and who, either through neglect, or with their customers' wish and knowledge, retain the title in their own name. Unless excepted by special statute, they are liable to assessment should the corporation that issued the stock fail. In one of the later cases, the court, realizing the importance of the question, said: "The only safe rule on this subject is, that when stock is held in a representative capacity it should be noted on the stock-book of the bank, and if a person appears there as absolute owner of the stock, he will not generally be permitted to deny it. If he claims to be trustee and does not disclose it, he is guilty of laches, for which others should not suffer."²⁸

Courts have ruled otherwise,²⁹ declaring that as the customer is the real owner he ought to be held liable, but in thus ruling they have left out of sight the other principle above-mentioned, that the public are to be guided ordinarily by the record evidence of membership, and when one retains the title with the knowledge and wish of the other, it is just to hold him responsible to the public. The public can rarely know of secret

27 *May v. Genesee Co. Sav. Bank*, 120 Mich. 330. See this § (m).

28 *Kerr v. Urie*, 86 Md. 72, 79; *McKim v. Glenn*, 66 Md. 479; *Sherwood v. Ill. Trust & Sav. Bank*, 195 Ill. 112, 115, 116; *Rankin v. Fidelity Trust Co.*, 189 U. S. 242.

29 See *Houghton v. Hubbell*, 33 C. C. A. 574.

arrangements between broker and customer, nor should others be bound by their private arrangements after their discovery.

(g. 2.) On the other hand, when no change has been made in the record after an honest sale, through no fault of the vendor, he should not be assessed and the real holder escape.³⁰ In *Dunn v. Howe*,³¹ the Circuit Court of Appeals declared that "the record liability of the stockholder is statutory and for the security of creditors, yet a creditor may waive such statutory liability, and proceed against the real owner under the statute and on general principles." In other words, the real owner is liable, so is a person who knowingly and intentionally suffers the recorded title of stock to remain in his name. Of course, there cannot be a recovery against both, but the receiver can proceed against either;³² and if he proceeds against the statutory holder, he, in turn, can proceed against the real holder. If both are able to respond, the better plan is to proceed against the real holder and thus avoid circuity of action, which equity approves.

(h.) The vendor's duty and the vendee's liability are com-

30 *Cox v. Elmendorf*, 97 Tenn. 518; *Hayes v. Shoemaker*, 39 Fed. 319; *Whitney v. Butler*, 118 U. S. 655; *Snyder v. Foster*, 73 Fed. 136; *Young v. McKay*, 50 Fed. 394; *Foster v. Row*, 120 Mich. 1. See *Isham v. Buckingham*, 49 N. Y. 216. But see *Harpold v. Stobart*, 46 Ohio St. 397, and §12.

A stockholder who sells his stock at auction to the cashier while his bank is in good repute, giving to the auctioneer the certificate, is not liable to assessment four years afterward, because the stock still remains in his name. *Earle v. Coyle*, 38 C. C. A. 226, affg. 95 Fed. 99. Nor is the rule changed by a by-law forbidding any officer except the president and vice-president from becoming stockholders without the consent of the directors. *Ibid*.

31 107 Fed. 849. In *Houghton v. Hubbell*, 38 C. C. A. 574, 576, in which stock stood in the name of an agent and not in the real owner's name the receiver sued the latter and recovered. The court remarked assuming that an assessment could have been successfully maintained against the agents who stood upon the bank records as owners, still the controller might properly, in his discretion, elect to pursue directly the actual known owner, thus avoiding circuity of action and unnecessary litigation. Affg. 86 Fed. 547. See *Yardley v. Wilgus*, 56 Fed. 965.

32 See *Davis v. Stevens*, 17 Blatchf. (U. S.) 259.

plete after the certificate has been taken to the cashier with the request to transfer the stock to the purchaser.³³ Should, however, the cashier neglect to do this, and the vendor learn of the officer's delay, he ought to request the transfer to be made immediately, otherwise he will be liable.³⁴ But the law does not require of him to take legal action to compel the transfer in order to extinguish his liability.³⁵

(i.) A defrauded purchaser can rescind his purchase even after the bank's insolvency.³⁶ To justify a rescission the proof must be clear and the buyer's action prompt, after discovering the bank's insolvency.³⁷ But if creditors are to suffer thereby, the rescission will not be permitted.³⁸

(j.) The estate of a decedent or ward may be liable for an assessment by the national law; but the receiver must establish his case by proper evidence.³⁹ "The liability of a stockholder is not to be determined alone by the arithmetic of the receiver."⁴⁰ But an estate inherited by a ward after the bank's failure cannot be taken for an assessment.⁴¹

33 *Richmond v. Irons*, 121 U. S. 27; *Whitney v. Butler*, 118 U. S. 655; see criticism of this case in *Earle v. Carson*, 188 U. S. p. 52; *Matteson v. Dent*, 176 U. S. 521; *Horton v. Mercer*, 18 C. C. A. 18; *Burt v. Bailey*, 19 C. C. A. 651; *McDonald v. Dewey*, 67 C. C. A. 408; *Hayes v. Shoemaker*, 39 Fed. 319; *Earle v. Coyle*, 97 Fed. 410. "We doubt if anything more is ordinarily done to secure such entry than to make a quiet request therefor of the proper person, when the owner of the stock generally accepts a promise of compliance, and goes his way in confidence that it will be fulfilled, and all that can be required of the assigning stockholder is the absence of any reason to doubt the good faith or intention of the bank officer, who promises to enter the transfer." *Hunt v. Seeger*, 91 Minn. 264, 267.

34 Chap. IV. §§17, 18.

35 Chap. IV. §19.

36 *Stufflebeam v. DeLashmutt*, 101 Fed. 367; *Newton Nat. Bank v. Newbegin*, 20 C. C. A. 339. See Chap. IV. §§ 6, 11.

37 *Ibid.*

38 *Ibid.* See Chap. IV, §6. *Wallace v. Hood*, 89 Fed. 11; *Stufflebeam v. De Lashmutt*, 83 Fed. 449, 451; *Wallace v. Bacon*, 86 Fed. 553.

39 *Brumm's Estate*, 8 Pa. Dist. 191.

40 *Ibid.*, 194.

41 *Clark v. Ogilvie*, 23 Ky. L. Rep. 552. The rendition of a judgment against the ward's estate does not stop the running of the statute of limitations in his favor. *Ibid.*

A legatee and executor of a stockholder who undertakes to settle his estate without the ordinary legal proceedings, and who does not transfer the stock to himself or to another person, cannot escape liability as executor, so far as he has assets, on the ground that the estate is fully settled.⁴²

Again, the neglect of the proper officer to cancel a surrendered certificate and his hypothecation of it will not exempt the holder of the new certificate to whom it was regularly issued, and who afterwards voted and received dividends on his stock from assessment.⁴³ Likewise a trustee who distributes an estate, leaving unpaid an assessment, is liable in equity therefor as well as the distributees,⁴⁴ and the remedy may be enforced as long as the assets can be reached, regardless of the statutory rule for filing claims against the estate.⁴⁵

When a bank is the unlawful owner of stock in another corporation the state and federal courts part company in applying the rule of additional liability to its stockholders. By state law a bank that has become the possessor of the stock of another corporation, has received dividends therefrom, can sell the stock and retain the proceeds regardless of its method of acquisition, can be assessed like any other stockholder for the payment of its debts should the corporation fail.⁴⁶ By federal law a national bank that becomes the owner of stock in another corporation under the same conditions, with similar rights to receive and retain dividends and sell the stock is exempt from the double liability in the event of its failure.⁴⁷

The attempts to hold national banks have failed on the

42 *Baker v. Beach*, 85 Fed. 836.

43 *Burt v. Bailey*, 19 C. C. A. 651.

44 *Mortimer v. Potter*, 213 Ill. 178.

45 *Ibid.*

46 *Hunt v. Hauser Malting Co.*, 90 Minn. 282, and cases cited, second trial, 103 N. W. 1032.

47 *California Sav. Bank v. Kennedy*, 167 U. S. 362; *First Nat. Bank v. Converse*, 200 U. S. 425. Mr. Zane's criticism on this ruling is, to my mind, unanswerable. *Banks and Banking*, §33, p. 64. The dissent of two judges in the *Converse* case is a hopeful augury of a change on this question.

ground that they had no authority to take or hold the stock assessed. Should not a line be drawn between two classes of cases, those in which a bank becomes the unwilling owner of stock as security for a past debt, and the cases in which a bank becomes an owner by purely voluntary action? A bank in the first class might with justice be exempted from additional loss by assessment, unless it had had a fair opportunity, which it had neglected, to dispose of its stock since acquiring ownership. In the other case ought not the bank, after profiting by its investment, to be required to pay its assessment like any other stockholder, and also be punished by the government for its infraction, instead of relieving it from liability and thereby adding to the loss of innocent creditors who neither knew, nor had any way for knowing that the relieved bank was a stockholder? Its release through judicial action is still more difficult to justify because the government possesses knowledge of all the holdings of every national bank. Through the remissness of officers in another department of the federal government, creditors are lured into believing they possess security of which they are afterward denied by the judicial power.

(k.) The law seeks to preserve and collect the entire fund for the benefit of creditors, and no exemptions, without a strong reason for them, are permitted. No one has a higher claim to exemption from an assessment than from an unpaid stock payment.⁴⁸ A stockholder therefore cannot exonerate himself from liability by transferring his stock to his bank.⁴⁹ But occasionally a national bank that has acquired either a temporary or permanent legal title to stock is exempted,⁵⁰ and so is the

48 An assessment against the estate of a stockholder is enforceable in the federal courts, though the estate is in process of settlement in a state court. *Brown v. Ellis*, 86 Fed. 357.

49 *In re Reciprocity Bank*, 22 N. Y. 9, 18.

50 *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364; *California Bank v. Kennedy*, 167 U. S. 362; *First Nat. Bank v. Converse*, 200 U. S. 425; *Shaw v. National German-Am. Bank*, 199 U. S. 603, affg. 65 C. C. A. 620; *Merchants' Nat. Bank v. Wehrmann*, 199 U. S. 603, 222; *Scofield v. Goodrich Bros. Bkg. Co.*, 39 C. C. A. 76. A savings bank holding as pledgee bank shares which it has no right to own is not the owner within

beneficiary of the earnings of stock.⁵¹ Married women, however, are liable,⁵² and so are guardians, executors, administrators, and all trustees in their official capacity, but not personally.⁵³ Nor can they prove without the clearest evidence that

the meaning of a statute relating to the liability of owners of stock. *Exchange Bank v. City & Sav. Bank*, Mont. L. Rep. (Can.) 6 Q. B. 196.

51 *Potter v. Mortimer*, 213 Ill. 178, affg. 114 Ill. App. 178.

52 By the national banking law: *Christopher v. Norvell*, 201 U. S. 216, affg. 67 C. C. A. 438; *Bundy v. Cocke*, 128 U. S. 185; *Keyser v. Hitz*, 133 U. S. 138; *National Bank v. Case*, 99 U. S. 628; *Anderson v. Line*, 14 Fed. 405; *Witters v. Sowles*, 32 Fed. 767 and 35 Fed. 640; *Kerr v. Urie*, 86 Md. 72; *In re First Nat. Bank of St. Albans*, 49 Fed. 120; *Robinson v. Turrentine*, 59 Fed. 554.

By state laws: *Wolbach v. Lehigh Building Assn.*, 84 Pa. 211; *Driesbach v. Price*, 133 Pa. 560; *Simmons v. Dent*, 16 Mo. App. 288; *In re Leeds Banking Co.*, L. R. 3 Eq. Cases 781; *National Com. Bank v. McDonnell*, 92 Ala. 387, 395; *Sayles v. Bates*, 15 R. I. 342; *Appeal of Parrish*, 19 At. (Pa.) 569; *In re Reciprocity Bank*, 22 N. Y. 9, 15.

"At common law, a married woman has no material rights as regards shares of stock subscribed for, or purchased by her." *Clapton, J.*, *National Com. Bank v. McDonnell*, 92 Ala. 387, 395.

53 *Diven v. Duncan*, 41 Barb. (N. Y.) 520; *Glenn v. Farmers' Bank*, 72 N. C. 626; *Clark v. Ogilvie*, 23 Ky. L. Rep. 552.

A stockholder, whose trusteeship is admitted is not personally liable. *Yardley v. Wilgus*, 56 Fed. 965; otherwise if his name appears on the books as the owner. *Sherwood v. Ill. Trust & Sav. Bank*, 195 Ill. 112; *Adams v. Clark*, 85 Pac. (Colo.) 642, 647; *Davis v. First Baptist Society*, 44 Conn. 582; *Pullman v. Upton*, 96 U. S. 328.

In Ohio one who holds stock as trustee for a bank is personally liable under Rev. Stat., §3259, making equitable holders liable for the debts of the incorporation. *Holcomb v. Gibson*, Ohio Sup. Dec. Unreported Cases 783; *Henkle v. Salem Mfg. Co.*, 39 Ohio St. 547, 552, but see §12.

One who knowingly permits his individual name to be entered on the proper book as the owner is liable to assessment even though he held the stock in truth as trustee for the bank. *Lewis v. Switz*, 74 Fed. 381. A stockholder who, suspecting the soundness of his bank, transfers his stock to his minor children is liable for the assessment. *Foster v. Lincoln*, 24 C. C. A. 470, affg. 74 Fed. 382. An executor in New York is not relieved from liability by a judicial settlement of his accounts while the stock remains on the bank books in the decedent's name. *Mahoney v. Bernhard*, 45 N. Y. App. Div. 499, affd. 169 N. Y. 589. The income from stock in a national bank was given by the testator to his daughter, the stock itself was transferred by the executors to themselves "as trustees." Nevertheless an action to recover an assessment was properly brought against them as executors, for they had no authority to transfer the stock to themselves

stock appearing by the record as held by them absolutely is nevertheless held by them in a representative character.⁵⁴

(l.) While a bank cannot invest its capital in stock, it can take and retain for a short period at least the stock of another corporation in discharge of a debt. It thus becomes the lawful purchaser and holder.⁵⁵ On stock thus acquired an assessment can be made and collected.⁵⁶ It is true that the bank is an unwilling purchaser, in one sense forced to buy to escape loss, yet having acquired it legally, such stock is none the less liable to assessment.

(m.) A stockholder cannot be assessed on stock issued in excess of the chartered limitation. If the company is responsible therefor, it must respond in money; it cannot violate its charter by increasing its capital.⁵⁷ But if the law permitted an increase, there is no reason for exempting stock thus legitimated, notwithstanding its parentage, any more than any other.

(n.) A secret transfer will not avail the assignor. As the New York Court of Appeals has said, "no secret transfer will avail to release the stockholder from his obligations, or deprive the creditors of the corporation of the right to look to him as the responsible party liable for the debts of the corporation."⁵⁸

as trustees; the direction by the testator in his will was clear and decisive. *Earle v. Rogers*, 105 Fed. 208. One who buys stock and puts it in the name of minor children is liable to assessment. *Foster v. Chase*, 75 Fed. 797. And if a son becomes of age after an assessment, but before suit has been brought to recover it and assents to holding the stock, his father is still liable. *Foster v. Wilson*, 75 Fed. 797.

54 *Kerr v. Urie*, 86 Md. 72; *Horton v. Mercer*, 18 C. C. A. 18.

55 *Hill v. Shilling*, 95 N. W. (Neb.) 24; *Tourtlot v. Whitehed*, 9 N. Dak. 467. See *National Bank v. Case*, 99 U. S. 628.

56 *California Sav. Bank v. Kennedy*, 167 U. S. 362; *Latimer v. Citizens' Sav. Bank*, 102 Iowa 162; *Hill v. Shilling*, 95 N. W. (Neb.) 24; *Citizens' State Bank v. Hawkins*, 38 C. C. A. 78. See this § (k).

57 *Scovill v. Thayer*, 105 U. S. 143.

58 *Shellington v. Howland*, 53 N. Y. 371, 376. The court also said: "An entry upon the books of registry of stockholders is required for the protection of the company and its creditors, and each may hold the stockholders to their liability as such until they have divested themselves of the title to their shares by a completed transfer, as prescribed by law."

15. Liability of Pledgor and Pledgee.

Unless a statute prescribes a different rule, the pledgee of stock to whom it is transferred is liable;⁵⁹ but if it remains in the name of the pledgor, or in the name of another as trustee for the pledgor, or is transferred in such a way as to indicate that the pledgee does not wish to assume legal ownership and liability, the pledgor's liability continues.⁶⁰ Nor will the subsequent consolidation of the bank whose stock is pledged, and the issue of new stock in place of the other, affect the pledgee's liability.⁶¹ Neither will a statute passed especially to relieve

59 *Pullman v. Upton*, 96 U. S. 328; *National Bank v. Case*, 99 U. S. 628; *Matteson v. Dent*, 176 U. S. 521; *Pauly v. State Loan & Trust Co.*, 165 U. S. 606; *Bowden v. Farmers' Bank*, 1 Hughes (U. S.) 307; *Hale v. Walker*, 31 Iowa 344; *Holyoke Bank v. Burnham*, 11 Cush. (Mass.) 183; *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563; *Erschine v. Loewenstein*, 82 Mo. 301; *Magruder v. Colston*, 44 Md. 349; *In re Empire City Bank*, 18 N. Y. 199; *Rosevelt v. Brown*, 11 N. Y. 148; *Aultman's Appeal*, 98 Pa. 505; *State v. Bank*, 70 Minn. 398; *Sherwood v. Ill. Trust & Sav. Bank*, 195 Ill. 112, 118; *Wheelock v. Kost*, 77 Ill. 296; *Donnally v. Hearndon*, 41 W. Va. 519; *Adams v. Clark*, 85 Pac. (Colo.) 642; *Hurlburt v. Arthur*, 140 Cal. 103; *Baines v. Babcock*, 95 Cal. 581; *People's Home Sav. Bank v. Rauer*, 84 Pac. (Cal.) 329; *Thompson v. Reno Sav. Bank*, 19 Nev. 103; *Herrick v. Wardwell*, 58 Ohio St. 294.

In one of the recent cases the Supreme Court of California said: "In the absence of an express statute to the contrary, the liability to pay calls and to respond to creditors in the event of insolvency of the corporation attaches to the holder of the legal title to the stock, and the courts will not look beyond the registered shareholder, nor inquire under what equity he holds, and so one who takes stock as collateral security and has it transferred to himself and so registered on the books of the company will be liable to the creditors." *Hurlburt v. Arthur*, 140 Cal. 103, 110.

60 *Pauly v. State Loan & Trust Co.*, 165 U. S. 606; *Anderson v. Phila. Warehouse Co.*, 111 U. S. 479; *Matteson v. Dent*, 176 U. S. 521; *Rankin v. Fidelity Trust Co.*, 189 U. S. 242; *Beal v. Essex Sav. Bank*, 15 C. C. A. 128; *State v. Bank*, 70 Minn. 398; *May v. Genesee Co. Sav. Bank*, 120 Mich. 330; *Henkle v. Salem Mfg. Co.*, 39 Ohio St. 547; *Hulett v. Ohio Valley Bank*, 137 Fed. 461; *Higgins v. Fidelity Ins. Co.*, 46 C. C. A. 509; *Baker v. Old Nat. Bank*, 86 Fed. 1,006, *affd.* 42 C. C. A. 133; *National Park Bank v. Harmon*, 21 C. C. A. 214; *Robinson v. Southern Nat. Bank*, 180 U. S. 295. For more cases see note to *Baker v. Old Nat. Bank*, 42 C. C. A. 135. The one in whose name stock stands is the owner so far as the bank is concerned. *Donnally v. Hearndon*, 41 W. Va. 519.

61 *Wilson v. Merchants' Loan & Trust Co.*, 39 C. C. A. 231, *affd.* 183 U. S. 121.

a pledgee from liability have that effect whenever the record of the transaction discloses no such relation, but absolute ownership.⁶² The burden of proof, too, is on a pledgee who permits the stock to stand in his name to show that he is only a pledgee in an action against him to recover an assessment.⁶³

Again, when the stock is transferred to the pledgee, he cannot relieve himself from "an immediate liability as a stockholder," like a pledgee in England, "by making a colorable transfer of his stock to another for his own benefit."⁶⁴

A surety to whom a certificate of stock is transferred as security which is not recorded, is not a pledgee. The possession of the certificate gives the surety neither possession of the stock, nor the right of possession.⁶⁵ A transfer on the books of the bank is needful to accomplish this result.⁶⁶ As he holds it as a personal indemnity merely, the bank, which holds the note of surety, has no interest therein.⁶⁷

16. Division of Double Liability Between Assignor and Assignee.

In some states stockholders after the transfer of their stock are still liable for a short period, from six months to two years, for an assessment not exceeding its par value, for their bank's prior indebtedness.⁶⁸ This is an independent liability not springing into existence on the bank's insolvency. It is opera-

62 *Tourtlot v. Stolteben*, 101 Fed. 362. In all cases the pledgee ought to notify the bank that issued the stock of his action. *Donnally v. Hearn-don*, 41 W. Va. 519.

63 *Donnally v. Hearn-don*, 41 W. Va. 519.

64 *McDonald v. Dewey*, 202 U. S. 510, the court citing *National Bank v. Case*, 99 U. S. 628; *Marcy v. Clark*, 17 Mass. 330; *Nathan v. Whitlock*, 9 Paige (N. Y.) 152.

65 *Hurlburt v. Arthur*, 140 Cal. 103; *State v. First Nat. Bank*, 89 Ind. 302, 311.

66 *Ibid*; *Wilson v. Little*, 2 N. Y. 443; *Brewster v. Hartley*, 37 Cal. 15; *Weyer v. Second Nat. Bank*, 57 Ind. 198.

67 *Osborn v. Noble*, 46 Miss. 449; *Van Orden v. Durham*, 35 Cal. 136; *Homer v. Savings Bank of New Haven*, 7 Conn. 478.

68 *Harper v. Carroll*, 62 Minn. 152, and 66 Minn. 490; *State v. Bank*, 70 Minn. 398; *Hunt v. Doran*, 92 Minn. 423; *Hunt v. Seeger*, 91 Minn. 264; *Hyatt v. Anderson*, 116 Ky. (74 S. W.) 1094.

But the assignee is also responsible for the debts contracted after he

tive on the stockholder for the period specified after he ceases to be one "substantially as if no corporation existed legally and the debts had been contracted on its behalf as an association of individuals."⁶⁹

Far more generally a stockholder's liability for the indebtedness of his bank passes by the transfer of his stock to the purchaser. The liability is an incident that follows the stock; and the purchaser therefore becomes liable for all past as well as future indebtedness.⁷⁰

To this rule Ohio is the most prominent exception. In that state, on the failure of a bank, an assignor is still liable to pay his proportion of the indebtedness, if any exists, contracted before parting with his stock, provided his assignee is also insolvent.⁷¹ Furthermore, as his liability is not secondary, like his liability to the creditors of a bank for its indebtedness while in a solvent condition, an extension of a corporate debt does not release his liability to the bank's creditors for this additional amount.⁷² For the payment of this additional sum he

becomes a member, and also for prior debts. *Olson v. Cook*, 57 Minn. 552; *Gebhard v. Eastman*, 7 Minn. 56. See §7.

⁶⁹ *Paine v. Stewart*, 33 Conn. 516, 529; *Southmayd v. Russ*, 3 Conn. 52; *Deming v. Bull*, 10 Conn. 409. See *Corning v. McCullough*, 1 N. Y. 47.

In Georgia a stockholder is liable for six months after he has transferred his stock. Code of 1882. Sec. 1496. For its construction see *Brunswick Terminal Co. v. National Bank*, 192 U. S. 386, affg. 112 Fed. 812; *Brobston v. Downing*, 95 Ga. 505; *Chatham Bank v. Brobston*, 99 Ga. 801. By subsequent legislation he is not liable after parting with his stock. *Wheatley v. Glover*, 54 S. E. (Ga.) 626.

⁷⁰ *Barton Nat. Bank v. Atkins*, 72 Vt. 33; *Foster v. Row*, 120 Mich. 1; *Story v. Furman*, 25 N. Y. 214; *Barrick v. Gifford*, 47 Ohio St. 180, 189, 190; *Ball Electric Light Co. v. Child*, 68 Conn. 522; *Wheatley v. Glover*, 54 S. E. 626. See dissenting opinion in *McDonald v. Dewey*, 202 U. S. 510.

Contra.—*Murphy v. Wheatley*, 63 At. (Md.) 62; *Miners' & Merch. Bank v. Snyder*, 100 Md. 57, 67.

⁷¹ *Peter v. Union Mfg. Co.*, 56 Ohio St. 181; *Harpold v. Stobart*, 46 Ohio St. 397; *Brown v. Hitchcock*, 36 Ohio St. 667; *Barrick v. Gifford*, 47 Ohio St. 180, 189, 190; *Taylor v. West Liberty Wheel Co.*, 9 Am. Law Rec. 28.

⁷² *Taylor case*, 9 Am. Law Rec. 28. A stockholder who transfers his stock after the creation of a corporate debt is not relieved from his

is not a surety, but direct contingent debtor, on the failure of the corporation, for so much, not exceeding the maximum, as may be needed to pay its creditors.

Perhaps an explanation of the transformation of liability of assignor and assignee to the creditors of their company may be worth adding. In the earlier days the character of a company depended on the character and ability of its members, consequently regulations were adopted to preserve the continuity of the relation. One of the reasons for doing this was the need of having members able and willing to pay calls, as the entire stock was rarely paid in the beginning; and also to preserve the credit of the company. When, therefore, one sold his stock he was often still liable to creditors, especially for the company's indebtedness contracted while he was a member, though the assignee was primarily liable.⁷³ The modern tendency among corporations, resulting from changed conditions of wealth and business, is to put fewer restrictions around their stockholders in transferring their property, while creditors regard with indifference the personnel of these institutions. Consequently, the assignee, and he only, is now generally regarded as responsible to creditors for the statutory, or double liability, for all indebtedness of the corporation, whether contracted before or after his succession.

17. Effect of Repealing Double Liability.

The repeal of a statute imposing a liability on stockholders for the debts of their bank does not relieve them from its prior indebtedness. Such a statute would impair their clear obliga-

statutory liability therefor by an extension of it, though the agreement for the extension was made by bank and creditor after the transfer and without the knowledge of the transferrer. *Boice v. Hodge*, 51 Ohio St. 236.

73 Says Justice White, in a luminous opinion, the assignor's "successive assignees or holders, by accepting the stock and all the rights and benefits arising therefrom, impliedly undertake to indemnify or discharge him from the liability which attached to him as a stockholder while he held the stock." *Brown v. Hitchcock*, 36 Ohio St. 667, 680.

tions and is forbidden by the federal constitution.⁷³ In like manner when the capital stock of a bank is increased, a subsequent creditor has no claim on the increased amount, for he did not contract with reference to this additional security.⁷⁴

18. Recovery of Assessment Wrongfully Paid.

An assessment made on the apparent owner of stock and voluntarily paid cannot be recovered from the receiver on the ground of mistake in paying it after the discovery that so large a sum was not needed to pay the bank's indebtedness.⁷⁵

19. Liability of Officers for Debts in Excess of Capital.

By statute in several states the directors and other officers who contract debts in excess of the capital of their company are made personally liable for the excess. This can be recovered in an action of debt, after their liability has been determined, quite in the same manner as stockholders for the balance of their unpaid subscriptions, or for their double liability.⁷⁶ On some occasions, however, the courts have declared that the remedy must be in equity.⁷⁷

In some of the states this liability is regarded as a penalty that can be recovered only in a local action;⁷⁸ in other states the action is transitory and the guilty officer can be pursued in any jurisdiction.⁷⁹

73 *Barton Nat. Bank v. Atkins*, 72 Vt. 33; *Hawthorne v. Calef*, 2 Wall. (U. S.) 10; *Ochiltree v. Railroad Co.*, 21 Wall. 249; *Provident Sav. Institution v. Jackson Rink*, 52 Mo. 552. *Appeal of Grand Rapid Sav. Bank v. Warren*, 52 Mich. 557.

74 *Ibid.*

75 *Holt v. Thomas*, 105 Cal. 273; *Brumagim v. Tillinghast*, 18 Cal. 265, 271.

76 *First Nat. Bank v. Price*, 33 Md. 487; *Simmons v. Taylor*, 106 Tenn. 729; *Kritzer v. Woodson*, 19 Mo. 327.

77 *Stone v. Chisolm*, 113 U. S. 302; *Hornor v. Henning*, 93 U. S. 228.

78 Same cases as those in note 76. See *Lawler v. Burt*, 7 Ohio 341.

79 *Farr v. Briggs*, 72 Vt. 225, containing an able discussion; *Ex parte Van Riper*, 20 Wend. (N. Y.) 614; *Neal v. Moultrie*, 12 Ga. 104, an elaborate opinion.

20. Receiver's Procedure by National Banking Law Against Stockholders.

By the national banking law, the mode of procedure against stockholders is exceedingly simple.⁸⁰ As soon as the receiver ascertains the deficiency, he notifies the controller of the currency, who orders an assessment for the amount required, not exceeding the entire amount.⁸¹ His action in making the order is conclusive and cannot be reviewed,⁸² or collaterally attacked.⁸³ Suits are brought by the receiver against the stockholders for the sums thus required. And if the assessment first ordered is insufficient, a second or third may be made for any amount not exceeding in the aggregate the par value of the stock.⁸⁴ Indeed, an assessment may be levied even to pay the expenses of administering the estate,⁸⁵ but not by reason of the failure of stockholders to pay their first assessment.⁸⁶ And a stockholder who has been assessed can recover no portion by subrogation, or other method.⁸⁷ Lastly, an assignee of a stock-

80 See §11 f.; *King v. Pomeroy*, 121 Fed. 287; *Studebaker v. Perry*, 184 U. S. 258, affg. 121 Fed. 947.

81 *Aldrich v. Campbell*, 97 Fed. 663; *Rankin v. Barton*, 199 U. S. 228; *Kennedy v. Gibson*, 8 Wall. (U. S.) 498; *Richmond v. Irons*, 121 U. S. 27; *Bushnell v. Leland*, 164 U. S. 684; *Columbia Nat. Bank v. Mathews*, 56 U. S. App. 636; *Nead v. Wall*, 70 Fed. 806; *Young v. Wempe*, 46 Fed. 354; *Welles v. Stout*, 38 Fed. 67; *Aldrich v. Yates*, 95 Fed. 78; *Strong v. Southworth*, 8 Ben. (U. S.) 331.

82 *Bushnell v. Leland*, 164 U. S. 684; *Christopher v. Norvell*, 201 U. S. 216; *Aldrich v. Campbell*, 97 Fed. 663; *Welles v. Stout*, 38 Fed. 67; *Man v. Cheeseman*, Fed. Cas. No. 9,002a.

83 *Rankin v. Barton*, 199 U. S. 228; *Aldrich v. Campbell*, 97 Fed. 663; *Brown v. Tillinghast*, 93 Fed. 326; *Welles v. Stout*, 38 Fed. 67; *O'Connor v. Witherby*, 111 Cal. 523.

84 *Studebaker v. Perry*, 184 U. S. 258; *Deweese v. Smith*, 45 C. C. A. 408; *Aldrich v. Campbell*, 97 Fed. 663; *Aldrich v. Yates*, 95 Fed. 78. That the defendant, though demanded, has failed or refused to pay his assessment or any part thereof, is a sufficient averment of non-payment. *O'Connor v. Witherby*, 111 Cal. 523.

85 *Beckham v. Hague*, 38 N. Y. Misc. 606.

86 *Ibid*; *United States v. Knox*, 102 U. S. 422.

87 *Sacramento Bank v. Pacific Bank*, 124 Cal. 147, 150.

holder must pay the assessment levied by the receiver even though this be done after his assignment.⁸⁸

The controller's assessment order is not affected by a subsequent general authority to compromise or sell all the claims or assets of the bank.⁸⁹ Nor is a compromise agreement with a stockholder concerning his assessment, which he has failed to execute, a bar to its recovery by future action.⁹⁰

In the earlier administration of the national banking law the highest authority declared that an action at law was the proper mode of procedure when the receiver sought to recover the entire amount of liability from stockholders, and a bill in equity for a part only.⁹¹ The distinction was soon disregarded,⁹² and a study of the cases shows that in many of them a bill has been brought, in others an action at law regardless of the question whether it covered the entire liability of a stockholder or not.⁹³

Among the states a diversity of practice still prevails, and it would be difficult to trace the details of the mode of procedure in all of them. In Kansas it was declared not long since that the double liability was an asset belonging to creditors who could sue therefor; that the remedy was for the benefit of the particular creditor suing, whose remedy was an action at law against each stockholder separately.⁹⁴ Evidently the statute aims to make the enforcement of the remedy as difficult and costly as possible.

In one direction there is a limitation on the receiver's authority to institute such a proceeding, where a national bank has gone into voluntary liquidation. The creditors must then pro-

88 *Graham v. Platt*, 28 Colo. 421.

89 *McClaine v. Rankin*, 119 Fed. 110.

90 *Ibid.*

91 *Kennedy v. Gibson*, 8 Wall. (U. S.) 498; *United States v. Knox*, 102 U. S. 422; *Casey v. Galli*, 94 U. S. 673; *Davis v. Stevens*, 17 Blatch. 259; *National Bank v. Case*, 96 U. S. 628; *Strong v. Southworth*, 8 Ben. (U. S.) 331.

92 *Bailey v. Sawyer*, 4 Dill. 463; *Stanton v. Wilkeson*, 8 Ben. (U. S.) 357; *Deweese v. Smith*, 45 C. C. A. 408, *affd.* 187 U. S. 637.

93 See *Union Nat. Bank v. Halley*, 104 N. W. (S. Dak.) 213.

94 *Fidelity Ins. & Trust Co. v. Mechanics' Sav. Bank*, 38 C. C. A. 193

ceed by a bill in equity. A trustee appointed to conduct the business of the liquidation has no such authority.⁹⁵

21. State Procedure.

(a.) In like manner in many states the receiver,⁹⁶ or assignee of a state bank may proceed on the authority or order of a court, as the statute prescribes, without danger of collateral attack by stockholders;⁹⁷ and in some states an assignee or receiver can act on his own judgment.⁹⁸ The rule in some states is still broader. As the receiver is the representative of the creditors, he may unite with them in a suit on a judgment against the corporation to recover the amount due from stockholders.⁹⁹ Nor are creditors obliged to wait until every claim is collected before enforcing the statutory liability of stockholders. Justice requires that they should pay the claims of the bank creditors, and look to the assignee or receiver for whatever may be realized from the remaining assets. No wrong is done by thus ordering an assessment before completing the collection of every claim; for if by the unexpected collection of

95 *Williamson v. American Bank*, 109 Fed. 36. An agent chosen by the stockholders to wind up the affairs of a national bank cannot, after all the debts are paid, enforce the individual liability of the stockholders. *Church v. Ayer*, 80 Fed. 543.

96 *Simmons v. Taylor*, 106 Tenn. 729; *Wilson v. Book*, 13 Wash. 676; *Watterson v. Masterson*, 15 Wash. 511; *Shuey v. Adair*, 24 Wash. 378; *Smathers v. Bank*, 135 N. C. 410; *Zieverink v. Kemper*, 50 Ohio St. 208; *Barton Nat. Bank v. Atkins*, 72 Vt. 33; *Post v. Toledo R.*, 144 Mass. 341; *McKusick v. Seymour*, 48 Minn. 158; *Somers v. Dawson*, 86 Minn. 42; *Persons v. Gardner*, 42 N. Y. App. Div. 490. See *Wincock v. Turpin*, 96 Ill. 135. In Minnesota, by Acts, 1894, Ch. 76 and 1895, Ch. 145, §20, a receiver may institute and maintain such a proceeding precisely as a creditor could do previously. "He is appointed for the benefit of all concerned, is the arm of the court, and for the purpose of collecting assets, enforcing the personal liability of shareholders, and administering upon the insolvent estate, is the proper party to bring the action." *Ueland v. Haugan*, 70 Minn. 349, 355.

97 *Shuey v. Adair*, 24 Wash. 378.

98 *Ueland v. Haugan*, 70 Minn. 349; *Anderson v. Seymour*, 70 Minn. 358.

99 *Childs v. Blethen*, 82 Pac. (Wash.) 405.

doubtful claims, the assets prove more than sufficient, the excess may be returned to the stockholders.¹

(b.) Other states, which have adopted the double liability principle, still require creditors to take action instead of the receiver for its recovery.² The technical reason for withholding this authority from him is that this is an asset belonging wholly to the creditors and not to the corporation, which it can not therefore recognize and enforce. As the receiver is regarded as purely an officer of the corporation, it is outside his proper functions to collect this asset for the creditors and distribute it among them.

To this reasoning there is, we think, a conclusive answer. It is true that the asset is for the benefit of the bank, or rather its creditors, so are all the other assets; and while the receiver serves the bank and its members, he also serves the creditors and may be removed if unfaithful to their interests.³ Again, neither public policy nor good morals are served in thus restricting his authority; on the other hand, experience has shown that all interests have been aided, expenses lessened, proceedings simplified by intrusting this authority to the receiver and by thus putting him in control of the entire estate, instead of reserving a part for the management of the creditors.

1 *Zang v. Wyant*, 25 Colo. 551.

2 *Zang v. Wyant*, 25 Colo. 551, 555, and cases cited; *Adams v. Clark*, 85 Pac. (Colo.) 642; *Hamilton Nat. Bank v. Am. Loan & Trust Co.*, 66 Neb. 67; *Brinkworth v. Hazlett*, 64 Neb. 592; *Hazlett v. Woodhead*, 63 At. (R. I.) 952; *Murphy v. Wheatley*, 100 Md. 358, 366; *Miners' & Merch. Bank v. Snyder*, 100 Md. 57; *Maine Trust & Bkg. Co. v. Southern Loan & Trust Co.*, 92 Me. 444; *Millisack v. Moore*, 76 Mo. App. 528; *Dutcher v. Marine Nat. Bank*, 12 Blatchf. (U. S.) 435; *Evans v. Nellis*, 187 U. S. 271. And a change in procedure may be applied to pending cases so long as existing contracts or vested rights are not impaired. *Murphy v. Wheatley*, 100 Md. 358, 366.

3 *Knowles v. Sandercock*, 107 Cal. 629. A receiver "represents the creditors as well as the stockholders and holds the property for the benefit of both. He is the trustee for both, and, as trustee for the creditors, can maintain and defend actions which the corporation could not." *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 583; *National State Bank v. Vigo Co. Nat. Bank*, 141 Ind. 352, 356; *National Trust Co. v. Miller*, 33 N. J. Eq. 155, 158. See §23.

Procedure by a receiver commends itself by reason of its manifest superiority over the more cumbersome and costly method of action by creditors. In an action by one, or all of them, against a single stockholder or several of them, a gross injustice may be perpetrated, even though they are not compelled to contribute more than the law requires. For the other stockholders may be spared, and while those who are forced to contribute may perhaps have their remedy against their associates for contribution, manifestly the creditors should be required to proceed against all and recover from them their just proportions. Through a receiver, who represents the bank, its creditors and stockholders, the equities of all parties can be worked out in a single proceeding.⁴ Nevertheless, some courts are still so strongly under the spell of a pure theory, and are unable to follow along in the newer and better way adopted by other tribunals.

(c.) In some states, wherein the liability of a stockholder is regarded as contractual, an attachment may be made as in the case of any other contract.⁵

22. Preliminary Proceedings Against Bank as Basis of Action Against Stockholders.

To lay a proper foundation for proceeding against the stockholders, the bank's inability to discharge its obligations must have been judicially ascertained. The judicial ascertainment may be accomplished in three different ways.

(a.) When proceedings are undertaken by creditors, they must first obtain a formal judgment against the bank in a proceeding especially brought for this purpose. The rule rests on the conception that a stockholder is a guarantor and consequently cannot be held until the latter's inability to pay has been judicially determined.⁶

4 See the instructive case of *Miller v. Smith*, 58 At. (R. I.) 634.

5 *Adams v. Clark*, 85 Pac. 642; *Kennedy v. California Sav. Bank*, 97 Cal. 93; *Harper v. Carroll*, 66 Minn. 487; *Hanson v. Davison*, 73 Minn. 454.

6 *McClaren v. Franciscus*, 43 Mo. 452; *Farmers' Loan & Trust Co. v.*

It hardly need be added that the creditor must have a genuine claim, to entitle him to begin such a proceeding, either alone or in behalf of other creditors. Thus a guaranty by a bank of the debt of another is not a debt of its own until it is due, and the holder is not a creditor who can proceed against the stockholders until after a default.⁷

(b.) Generally, the necessity of obtaining this judgment against the bank, before proceeding against its members, does not exist whenever it has been declared judicially insolvent. This fact is ample proof to justify action against them to recover enough to discharge the bank's indebtedness, not exceeding their maximum liability.⁸

And this is especially true when the proceeding is brought by the receiver. "If the action were brought," remarks the Supreme Court of Nebraska, "as is permitted by some statutes and practised in some jurisdictions, directly by the creditor, it might be required of him to show an execution against the bank before assailing a stockholder as such. But surely a receiver ought not to be required to issue and pay for executions against himself, in order to make sure he has no trust funds still in his hands."⁹

Funk, 49 Neb. 353; Hastings v. Barnd, 55 Neb. 93; Baxter v. Moses, 77 Mo. 465; Maine Trust & Bkg. Co. v. Southern Loan & Trust Co., 92 Me. 444; Hale v. Cushman, 96 Me. 148; Steffins v. Guernsey, 61 Kan. 292; Hanson v. Davison, 73 Minn. 454; Barrick v. Gifford, 47 Ohio St. 180; New Hampshire Sav. Bank v. Richey, 58 C. C. A. 294.

By the Nebraska constitution, Art. II, Sec. 4, the amount of a stockholder's liability must be "judicially ascertained" by judgment or its equivalent before the liability can be enforced. Hastings v. Barnd, 55 Neb. 93; Commercial Nat. Bank v. Gibson, 37 Neb. 750; Globe Pub. Co. v. State Bank, 41 Neb. 175; Farmers' Loan & Trust Co. v. Funk, 49 Neb. 353; State v. German Sav. Bank, 50 Neb. 734.

⁷ McHale v. Moore, 66 Kan. 267.

⁸ Booth v. Dear, 96 Wis. 516; State v. Union Stock Yards State Bank, 103 Iowa 549; Zang v. Wyant, 25 Colo. 551.

⁹ Brinkworth v. Hazlett, 64 Neb. 592. In New York, however, the statute is imperative and the only exceptions are "where the corporation has been dissolved by judicial decree; where by final judgment in an action for sequestration a perpetual injunction has been issued restraining suits

(c.) By a more recent rule, "creditors may proceed against the stockholders when it clearly appears that their liability will have to be ultimately resorted to to fully pay the corporation debts." Of course, this rule applies only to a bank in declared bankruptcy. This is the most rational rule, for there is no danger of needless action. Should there be a subsequent collection of debts, as unexpected as joyful to the stockholders, rendering their contributions unnecessary, the surplus would be returned, thus saving them from loss and relieving them from liability.¹⁰

(d.) Again, from a decree fixing the amount of the bank's debts and levying an assessment, an appeal may be taken either by the receiver or the stockholders. And as the proceeding is essentially of an equitable nature, the possibility of an appeal is not defeated by the small amount in controversy.¹¹

23. Similarity of Preliminary Proceedings in Cases of Unpaid Subscriptions and Double Liability.

An eminent tribunal, speaking through Justice Vann, has declared that "there is no substantial difference between the liability for an unpaid balance on a stock subscription, and the liability for the unpaid deficiency of assets assumed by the act of becoming a member of the corporation through the purchase of stock, from which a contract is implied to perform the statutory conditions upon which the stock may be owned. The express promise runs to the corporation, and may be enforced by it; while the implied promise runs to the creditors, and may, according to the common law of the state wherein it was made, be enforced for the benefit of creditors or by a receiver of the corporation appointed to wind up its affairs."¹²

by creditors; and where, by statute, such suits are prohibited." *Gause v. Boldt*, 49 N. Y. Misc. 340, 345; *United Glass Co. v. Vary*, 152 N. Y. 121.

¹⁰ *Zang v. Wyant*, 25 Colo. 551.

¹¹ *Bennett v. Thorne*, 78 Pac. (Wash.) 936.

¹² *Howarth v. Angle*, 162 N. Y. 179. The same view is maintained by other courts. *Hanson v. Davison*, 73 Minn. 454; *Childs v. Cleaves*, 95 Me. 498, 507; *King v. Cochran*, 72 Vt. 107, 668; *Barton Nat. Bank v. Atkins*, 72 Vt. 33. "In principle there can be no difference in this respect

24. How Far is Judgment Against Bank Conclusive Against Stockholders.

A judgment, untainted by fraud,¹³ and without mistake,¹⁴ rendered by a court of competent jurisdiction,¹⁵ on a contract *intra vires*,¹⁶ is conclusive with respect to the amount of the bank's indebtedness and the propriety of its procedure.¹⁷ In a well-considered case, the Supreme Court of Minnesota has

between an action to enforce an unpaid subscription and one to enforce a stockholder's liability." Start, Ch. J., *Hanson v. Davison*, 73 Minn. 454, 462. See an able opinion maintaining the same view in *Holland v. Duluth Iron Co.*, 65 Minn. 480.

13 *Wilson v. Kiesel*, 9 Utah 397, and 164 U. S. 248, dismissing appeal; *Hanson v. Davison*, 73 Minn. 454; *Merchants' Bank v. Chandler*, 19 Wis. 434; *Bisset v. Ky. River Nav. Co.*, 15 Fed. 353; *Saylor v. Com. Banking Co.*, 38 Or. 204; *Town of Hinckley v. Kettle River R.*, 80 Minn. 32; *Barron v. Paine*, 83 Me. 312; *Schertz v. Bank*, 47 Ill. App. 124; *Gund v. Ballard*, 103 N. W. (Neb.) 309; *Ball v. Reese*, 58 Kan. 614; *Warrington v. Ball*, 33 C. C. A. 609; *Ward v. Joslin*, 44 C. C. A. 456; *American Nat. Bank v. Supplee*, 115 Fed. 657; *Wood v. Wood*, 78 Ky. 625 and cases cited; *Clark v. Ogilvie*, 63 S. W. (Ky.) 429. See 2 Black on Judgments, §583.

"We think it cannot be doubted that a decree against a corporation in respect to corporate matters, such as the making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members, in the absence of fraud, and that this is involved in the contract created in becoming a member." *Hawkins v. Glenn*, 131 U. S. 319; see *Glenn v. Liggett*, 135 U. S. 533.

14 *Merchants' Bank v. Chandler*, 19 Wis. 434.

15 *Fogg v. Ellis*, 61 Neb. 829; *Schertz v. First Nat. Bank*, 47 Ill. App. 124; *Ball v. Reese*, 58 Kan. 614; *American Nat. Bank v. Supplee*, 115 Fed. 657.

16 *Ward v. Joslin*, 186 U. S. 142.

17 *Hawkins v. Glenn*, 131 U. S. 319; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640; *Sanger v. Upton*, 91 U. S. 56, 58; *Hendrickson v. Bradley*, 29 C. C. A. 303; *Wilson v. Seymour*, 40 U. S. App. 567; *Warrington v. Ball*, 33 C. C. A. 609; *Brown v. Trail*, 89 Fed. 641; *Stutz v. Handley*, 41 Fed. 531; *American Nat. Bank v. Supplee*, 115 Fed. 657; *Ball v. Reese*, 58 Kan. 614; *Wilson v. Kiesel*, 9 Utah 397; *Donworth v. Coolbaugh*, 5 Iowa 300; *Wheatley v. Glover*, 54 S. E. (Ga.) 626; *Came v. Brigham*, 39 Me. 35; *Childs v. Cleaves*, 95 Me. 498; *Hanson v. Davison*, 73 Minn. 454; *Willius v. Mann*, 91 Minn. 494; *Glenn v. Williams*, 60 Md. 93, 115; *Howarth v. Lombard*, 175 Mass. 570, 577; *Bullock v. Kilgour*, 39 Ohio St. 543; *Calloway v. Glenn*, 105 Ky. 648; *Heggie v. People's Building Assn.*, 107 N. C. 581; *Schertz v. First Nat. Bank*, 47 Ill. App. 124; *Hamilton v. Glenn*, 85 Va. 901; *Howell v. Mangledorff*, 33 Kan. 194. See §26, also valuable note, 52 C. C. A. 305.

declared that "the judgment in such original action, determining the amount of the corporate debts remaining unpaid, is binding on all the stockholders, whether parties to the action or not, unless impeached for fraud. A judgment against the corporation is, in effect, a judgment against the stockholders in their corporate capacity. They are represented by the corporation in the action."¹⁸ Consequently it binds a non-resident,¹⁹ or stockholder on whom personal service was not rendered²⁰ as effectively as any other. Nor is the judgment less effective if rendered by default.²¹

25. Same Subject.

While the conclusiveness of the judgment against the bank cannot be questioned except for mistake, lack of jurisdiction, fraud, or *intra vires* contract, the judgment does not conclude the membership, amount, or liability of any stockholder, resident²² or non-resident.²³ Indeed, there is a manifest tendency,

18 *Hanson v. Davison*, 73 Minn. 454, 462; *Hale v. Hardon*, 37 C. C. A. 240, 251, citing many cases.

19 *Childs v. Cleaves*, 95 Me. 498; *Hanson v. Davison*, 73 Minn. 454, 461.

20 *Glenn v. Springs*, 26 Fed. 494; *Hale v. Hardon*, 37 C. C. A. 240, 251, citing many cases; *Howard v. Glenn*, 85 Ga. 238; *Lewis v. Glenn*, 84 Va. 947, 969.

Contra.—That a non-resident must be notified of the proceeding in order to be bound by the judgment, see *Pfaff v. Gruen*, 92 Mo. App. 560; *Farmers' Loan & Trust Co. v. Funk*, 49 Neb. 353; *Hazlett v. Woodhead*, 63 At. (R. I.) 952. See *Sumner v. Marcy*, 3 Wood. & M. (U. S.) 105, also §27b.

21 *Holyoke Bank v. Goodman Paper Mfg. Co.*, 9 Cush. (Mass.) 576; *Holland v. Duluth Iron Co.*, 65 Minn. 324.

22 *Hawkins v. Glenn*, 131 U. S. 319, 329; *Hale v. Hardon*, 37 C. C. A. 240; *Childs v. Cleaves*, 95 Me. 498; *Howarth v. Angle*, 162 N. Y. 179; *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557; *Willius v. Mann*, 91 Minn. 494. See note on this subject in 52 C. C. A. 305, also note on the effect of a judgment against a stockholder that has been obtained against the corporation, 97 Am. St. Rep. 463-472.

23 *Hancock Nat. Bank v. Farnum*, 176 U. S. 640; *Pfaff v. Gruen*, 92 Mo. App. 560; *Childs v. Cleaves*, 95 Me. 498; *Howarth v. Angle*, 162 N. Y. 179; *Howarth v. Lombard*, 175 Mass. 570; *Moss v. Whitzell*, 108 Fed. 579. In *Schertz v. First National Bank*, 47 Ill. App. 124, 138, Lacey, J., said: "The stockholder would not be precluded from making a defence if he had a valid one. He may have paid in some legal way a sum equal to his

while strongly asserting abstractly the binding force of a judgment, to undermine the rule in its application. Thus the highest federal tribunal has declared that the judgment is not conclusive when the bank could have shown that the obligation on which the creditor obtained judgment was invalid. In a subsequent action by the creditor against the stockholders of the national bank to enforce their liability, they were permitted to attack the prior judgment and to show that the maker of the notes thus guaranteed had been released, effecting the release of the guarantor. Justice Blatchford, who rendered the opinion of the court, declared that "the judgment against the corporation was not binding on the stockholders in the sense that it could not be re-examined."²⁴ And more recently it has been declared that a judgment creditor in a collateral proceeding against a stockholder may show that a part of the indebtedness merged in the judgment became a corporate debt too late for the statute of limitations to be invoked by the stockholders in a proceeding against him.²⁵ On the other hand, the corporation cannot go behind the judgment to establish a defence that might have been made before the recovery of the judgment.²⁶

In later decisions stockholders have successfully attacked the judgment against the bank, thereby releasing or lessening their liability.²⁷ The rule, early established in some states,

stock, or he might show that he did not own the stock in the time and manner required by the constitution and laws to make him liable, but not, we apprehend, that the corporation did not owe the debt represented by the judgment against it." See also *Howell v. Manglesdorf*, 33 Kan. 194.

²⁴ *Schrader v. Manuf. Nat. Bank*, 133 U. S. 67, 77.

²⁵ *Crissey v. Morrill*, 60 C. C. A. 460.

²⁶ *Ibid.*

²⁷ *Ward v. Joslin*, 186 U. S. 142; *Irons v. Manuf. Nat. Bank*, 36 Fed. 843; *Warrington v. Ball*, 33 C. C. A. 609; *Saylor v. Com. Bkg. Co.*, 38 Or. 204; *McBryan v. Universal Elevator Co.*, 130 Mich. 111; *Mandeville v. Reynolds*, 68 N. Y. 528. See *Conway v. Duncan*, 28 Ohio St. 102. "There can be no doubt of the rights of the stockholders in this action to set up any available defence that goes to the question of their liability upon which judgment has been obtained against the company. The defendants in this action were not as individual parties to the action in which judgment was

that such a judgment is not conclusive, but only *prima facie* evidence of its truth,²⁸ is likely to revive and become the general rule. In truth, it is difficult to discover what good purpose is served in reiterating the inviolability of a judgment as a general principle and then tossing it overboard so lightly whenever it stands in the way of a different specific ruling.

The highest court of New York has, we think, established a rule that will ultimately be accepted. A stockholder, though not before the court appointing a receiver, is bound by the decree appointing him, but its conclusiveness does not go much further. Consequently, when he is ultimately sued for the balance of his unpaid subscription, or his double liability, he may "controvert all the essential facts, such as insolvency, the amount of the deficiency, and the like, whether they are established by the judgment appointing the receiver or not."²⁹

Perhaps this is a rational consequence of the wider recognition of foreign judgments and receivers. While seeking to be broad-minded, the courts are more and more inclined to re-

recovered. That suit was against the corporation, which in law is a distinct person from the individual members which compose it. The ground of the liability of the company may not prevail against the stockholders.

. . . In this action it is therefore necessary to establish that the conditions of the liability exist. To do this necessarily involves an inquiry in this action into the grounds of the stockholders' liability." *Union Bank v. Wando Mining & Manuf. Co.*, 17 S. C. 339, 359.

28 *Conant v. Van Schaik*, 24 Barb. (N. Y.) 87, 95; *Merchants' Bank v. Chandler*, 19 Wis. 434; *Slee v. Bloom*, 20 Johns. (N. Y.) 669; *Moss v. Oakley*, 2 Hill (N. Y.) 265; *Moss v. McCullough*, 7 Barb. (N. Y.) 279; *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557; *Prescott v. Farmers' Nat. Bank*, 53 Pac. (Kan.) 769. The correctness of this decision itself cannot be questioned, for the court did not have jurisdiction, and this is a good reason for questioning a judgment in all cases. In Minnesota the judgment is conclusive for the amount. *Holland v. Duluth Iron Co.*, 65 Minn. 324. In Michigan it is not. *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557; *McBryan v. Universal Elevator Co.*, 130 Mich. 111. In *Schaeffer v. Mo. Home Ins. Co.*, 46 Mo. 248, the court held that a judgment against the company was *prima facie* evidence of its existence. A stockholder in an action against him is not thereby prevented from showing that the company was not properly organized and other defects.

29 *Howarth v. Angle*, 162 N. Y. 179.

view the proceedings of foreign courts that serve as a basis of action against the citizens within their own jurisdiction.

Furthermore, the right to attack a judgment for fraud, lack of jurisdiction and similar causes, rendered by a court in another state is not prevented by federal inhibition. This simply requires that the judgment shall be given the same effect in every other state as in the state of its rendition. "Neither the constitution of the United States, the laws of Congress, nor any rule of comity requires the courts of [any] state to shield a judgment from attacks that might have been successfully made upon it in the state where it was rendered."³⁰ It may be added that whenever the federal courts are enforcing the assessment regulations of the states against the stockholders of state institutions, they must follow the construction given to them by the respective state tribunals.³¹

The appropriate remedy for stockholders is a bill in equity to determine the validity of the judgment and enjoin action against them until its determination, giving bond for the payment of the judgment if rendered against them.³²

26. Parties to Creditors' Bill.

Wherever actions have been brought by creditors instead of receiver the courts have been confronted with a long series of questions relating to parties. Almost every conceivable view has been adopted by them. By one rule, one, or as many creditors as possible may unite in bringing the bill;³³ by another, this can be done by a single creditor;³⁴ or by a single

30 Sullivan, Ch. J., *Jaster v. Currie*, 90 N. W. (Neb.) 995, 996.

31 *Crissey v. Morrill*, 60 C. C. A. 460.

32 *Moss v. Whitzell*, 108 Fed. 579. In Ky. a shareholder of a bank who raises no issue to a petition filed against him by the creditors, under a double liability statute concerning the amount of debts, cannot raise this issue by exception to the report of the commissioners appointed to settle its affairs. *Hyatt v. Anderson*, 74 S. W. (Ky.) 1094.

33 *Coleman v. White*, 14 Wis. 700; *Cleveland v. Marine Bank*, 17 Wis. 545; *Merchants' Bank v. Chandler*, 19 Wis. 434; *Herrick v. Wardwell*, 58 Ohio St. 294; *Thompson v. Reno Sav. Bank*, 19 Nev. 103.

34 *Bank v. Ibbotson*, 24 Wend. (N. Y.) 473; *Garrison v. Howe*, 17 N. Y. 458, 463; *Harrell v. Blount*, 112 Ga. 711; *Hightower v. Thornton*, 8

creditor against a single stockholder.³⁵ In like manner the bill can be brought against the bank and all the stockholders,³⁶ or against them separately.³⁷ The better rule is to bring the bill by one or more creditors in behalf of all against all the stockholders and the bank.³⁸ The court unfavorably regards different suits for the same end; therefore in seeking a remedy against a failed bank or its stockholders, the law favors a single action in which all have a common interest against all

Ga. 486; *Stinson v. Williams*, 35 Ga. 170; *King v. Sullivan*, 93 Ga. 621; *Fouche v. Merchants' Nat. Bank*, 110 Ga. 827; *Erickson v. Nesmith*, 15 Gray (Mass.) 221; *Crease v. Babcock*, 10 Met. (Mass.) 525, 531; *Ball v. Reese*, 58 Kan. 614. "He is under no duty to other creditors to bring an action for their benefit as well as his own, though, as a matter of course, a court of equity cannot properly lend him its aid, when it appears, not only that there are other creditors standing equal with him in right, but that there is not enough for all, and that the granting of the relief which he seeks will take from them some portion of their ratable share of the assets of the common debtor." *Lumpkin, J., Harrell v. Blount*, 112 Ga. 711, 718.

35 *Mechanics' Sav. Bank v. Fidelity Trust Co.*, 87 Fed. 113; *Schalucky v. Field*, 124 Ill. 617; *Bank v. Ibbotson*, 24 Wend. (N. Y.) 473; *Garrison v. Howe*, 17 N. Y. 458, 463; *Thompson v. Reno Sav. Bank*, 19 Nev. 103; *Hatch v. Dana*, 101 U. S. 205; *Union Nat. Bank v. Halley*, 104 N. W. (S. Dak.) 213.

36 By Gen. Stat. of Minn. 2501, the liability of each stockholder is several to all the creditors, but all must be joined in one action in equity brought by all the creditors against the stockholders and the bank. *Finney v. Guy*, 106 Wis. 256, 265. The statutory remedy is exclusive and therefore an action by the creditors in Minnesota against the stockholders is a bar to a subsequent action in another state. *Ibid.* All the living stockholders and representatives of deceased ones should be made parties to the bill. *New England Com. Bank v. Newport Steam Factory*, 6 R. I. 154.

37 *Abbey v. Grimes Dry Goods Co.*, 44 Kan. 415. The rule, that stockholders of a corporation cannot be joined as defendants, necessarily rests upon the ground that the liability is for different sums, and each stockholder might have a distinct and separate defence. *Ibid.*, 419, citing *Bank v. Ibbotson*, 24 Wend. (N. Y.) 473; *Crease v. Babcock*, 10 Met. (Mass.) 525 and other cases.

38 *Hastings v. Barnd*, 55 Neb. 93; *Farmers' Loan & Trust Co. v. Funk*, 49 Neb. 353; *German Nat. Bank v. Farmers' & Merch. Bank*, 54 Neb. 593; *Pfohl v. Simpson*, 74 N. Y. 137; *Pickering v. Hastings*, 56 Neb. 201; *Van Pelt v. Gardner*, 54 Neb. 701; *Reed v. Burg*, 2 Neb. (Unof.) 117; *Williams v. Meloy*, 97 Wis. 561; *Booth v. Dear*, 96 Wis. 516, 519; *Gianella v. Bigelow*, 96 Wis. 185.

the parties which have a common interest in opposing it. One of the great merits in endowing a receiver with authority is that none of these questions concerning parties arise.³⁹

Parties that are omitted may be included at proper stages in the proceedings. But after a final judgment has been rendered, this is conclusive both in favor of, and against all parties. "Thereafter for the purpose of enforcing or sharing in the stockholders' obligation, no one is a creditor save those who have joined as plaintiffs. . . . Defendants will have the full benefit of such adjudication, for no other creditor can ever proceed against them."⁴⁰

27. Proceedings Against Foreign Stockholders.

By the modern rule an assignee, receiver,⁴¹ or one or more creditors for the benefit of all⁴² can proceed by a bill in equity against a non-resident stockholder in any state where its own citizens are subject to a similar liability as stockholders of

39 *Gager v. Bank*, 101 Wis. 593; *Gager v. Marsden*, 101 Wis. 598.

40 *Dodge, J., Rehbein v. Rahr*, 109 Wis. 136, 152; *Finney v. Guy*, 106 Wis. 256; *Eau Claire Nat. Bank v. Benson*, 106 Wis. 624.

41 *Love v. Pusey*, 3 Penn. (Del.) 577; *Lanigan v. North*, 69 Ark. 62; *Howarth v. Lombard*, 175 Mass. 570; *King v. Vinal*, 175 Mass. 580; *Cushing v. Perot*, 175 Pa. 66; *Wilson v. Book*, 13 Wash. 676; *Watterson v. Masterson*, 15 Wash. 511; *Childs v. Cleaves*, 95 Me. 498; *Howarth v. Angle*, 162 N. Y. 179; *Kirtley v. Holmes*, 107 Fed. 1; *Howarth v. Ellwanger*, 86 Fed. 54; *Hale v. Hardon*, 95 Fed. 747; *Sheafe v. Larimer*, 79 Fed. 921 and cases cited; *Cuykendall v. Miles*, 10 Fed. 342; *King v. Cochran*, 72 Vt. 107. See *Castleman v. Templeman*, 87 Md. 546; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39; *Broadway Nat. Bank v. Baker*, 176 Mass. 294. See *Whitman v. Oxford Nat. Bank*, 176 U. S. 559.

42 *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 673; *Guerney v. Moore*, 131 Mo. 650; *Pfaff v. Gruen*, 92 Mo. App. 560, containing an elaborate review of cases; *Morris v. Glenn*, 87 Ala. 628; *Ferguson v. Sherman*, 116 Cal. 169; *Pulsifer v. Greene*, 96 Me. 438; *Abbott v. Goodall*, 100 Me. 231; *Bell v. Farwell*, 176 Ill. 489; *First Nat. Bank v. Gustin Mining Co.*, 42 Minn. 327; *Woodworth v. Bowles*, 61 Kan. 569, 582; *Rhodes v. U. S. Nat. Bank*, 66 Fed. 512; *McVickar v. Jones*, 70 Fed. 754; *Bank v. Rindge*, 57 Fed. 279; *State Nat. Bank v. Sayward*, 91 Fed. 443; *Relfe v. Rundle*, 103 U. S. 222; *Flash v. Conn*, 109 U. S. 371; *Huntington v. Atrill*, 146 U. S. 657; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559.

their own banking institution.⁴³ This principle rests on the broad rational basis of comity.

This rule is so obviously just and expeditious that its general adoption is certain. It is simply an extension of the rule that applies to the stockholders of national banks, which has proved so satisfactory. By this rule many questions that have troubled the state courts in developing a less comprehensive system do not arise.

(a.) Of course, a foreign assignee or receiver cannot maintain his suit if there be any question concerning the validity of the assignment from which he derives his authority;⁴⁴ or if the amount of the deficit required of stockholders has not been determined by a court of proper authority.⁴⁵ But when a bank has become insolvent and is in the possession of a receiver or other proper officer for collecting its assets, paying its indebtedness and ascertaining the amount due from stockholders, nowhere is there any need of a judicial determination of its inability to pay its indebtedness as the basis of action against a foreign stockholder.⁴⁶

It is true that a state which denies the right of an assignee or a receiver to proceed against delinquent stockholders and insists that either a creditor or all the creditors must proceed can hardly expect that its officers, whether acting by virtue of

43 *Childs v. Cleaves*, 95 Me. 498; *Howarth v. Lombard*, 175 Mass. 570; *Howarth v. Angle*, 162 N. Y. 179; *Love v. Pusey*, 3 Penn. (Del.) 577. "The right of any receiver appointed by the court of another state to sue as such in our courts rests upon the principle of interstate comity, and may be allowed only upon such conditions, or prohibited entirely, as the legislative authority of the state shall deem most conducive to the interests and welfare of the people of the state." *Wyman v. Kimberly-Clarke Co.*, 93 Wis. 554, 559, citing cases.

44 *Connor v. Omaha Nat. Bank*, 42 Neb. 602.

45 *McLaughlin v. O'Neill*, 7 Wy. 187, and 215.

46 *Ibid*; *Barnes v. Arnold*, 23 N. Y. Misc. 197, 201, *affd.* 169 N. Y. 611; *Shellington v. Howland*, 53 N. Y. 371; *Hirshfeld v. Bopp*, 145 N. Y. 84; *Sickles v. Herold*, 149 N. Y. 332; *Kincaid v. Dwinelle*, 59 N. Y. 548; *Hunting v. Blun*, 143 N. Y. 511.

a statute or order of the court, will be recognized in another jurisdiction.⁴⁷

(b.) As a ground for sustaining this action by receiver or creditors against a non-resident stockholder, he need not have participated in the preliminary proceedings against the bank.⁴⁸ While this is the more general rule, it does not prevail in every state,⁴⁹ for the reason that the notification of a bank of such a proceeding is not regarded as equivalent to a notification of its members. Whenever, therefore, notice to a non-resident stockholder of the preliminary proceedings is required, and it is not given, subsequent action cannot be maintained against him in the state where he resides.⁵⁰ Even in the states where non-residents are not required to be notified of the preliminary proceedings a judgment against the institution, forming the basis of subsequent proceedings against the stockholder himself, does not conclude his liability. In a recent case the highest federal tribunal remarks: "We do not mean that it is conclusive as against any individual sued as a stockholder, that he is one, or if one, that he has not already discharged by payment to some other creditor of the corporation the full measure of his liability, or that he has no claims against the corporation, or judgments against it, which he may, in law or equity, as any debtor, whether by judgment or otherwise, set off against a claim or judgment, but in other respects it is an adjudication binding him."⁵¹

(c.) Another limitation to this rule of comity must be heeded. If the statute on which a stockholder's liability is founded provides a remedy, this is exclusive and cannot be

47 *Hale v. Allinson*, 188 U. S. 56; *Covell v. Fowler*, 144 Fed. 535.

48 *Childs v. Cleaves*, 95 Me. 498; *Pulsifer v. Greene*, 96 Me. 438; *Hanson v. Davison*, 73 Minn. 454; *Castleman v. Templeman*, 87 Md. 546; *Hawkins v. Glenn*, 131 U. S. 319; *Hale v. Hardon*, 37 C. C. A. 240. This is one of the most valuable cases on this subject. See *Clark v. Knowles*, 187 Mass. 35, in which the question is discussed, but not decided.

49 *Farmers' Loan & Trust Co. v. Funk*, 49 Neb. 353; *Wheatley v. Glover*, 54 S. E. (Ga.) 626. See §24.

50 *Hazlett v. Woodhead*, 63 At. (R. I.) 952.

51 *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 643.

enforced in another state. In other words, the law distinguishes between a liability for which a remedy has been provided, and a liability without a specific remedy.⁵² In the latter case a foreign state will apply its own remedy; in the former case the specific remedy can be pursued only in the state of its adoption. This, of course, means a denial of justice to creditors and a complete shield to foreign stockholders, for they are not likely to visit the state wherein the specific remedy can be enforced for the purpose of submitting to its tribunals. "It certainly concerns the due administration of justice," remarks Chief Justice Field, "that all stockholders, wherever they reside, should be compelled by proceedings somewhere to perform the statutory obligations toward creditors of the corporation which they have assumed by becoming stockholders."⁵³ Is there any solid ground for this distinction? Why not employ the foreign remedy so far as this may be done without unduly infringing on the practice and principles of the home tribunals? Rather than cut one off from redress where the foreign remedy is "the only means of enforcing an undoubted right," Chief Justice Ewing contended sixty years ago in a noble dissenting opinion, the principle of comity ought to be so far extended as to permit him to use the foreign remedy.⁵⁴ Justice Vann, in *Howorth v. Angle*, while assert-

52 *Howarth v. Angle*, 162 N. Y. 179, 188; *Barnes v. Wheaton*, 80 Hun (N. Y.) 8; *Nimick v. Mingo Iron Works*, 25 W. Va. 184; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39 and cases cited; *Finney v. Guy*, 106 Wis. 256; *Abbott v. Goodall*, 100 Me. 231; *Middletown Nat. Bank v. Toledo & Northern Mich. R.*, 197 U. S. 394, and cases cited.

53 *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 47; *Bell v. Farwell*, 176 Ill. 489. In *Russell v. Pacific Railway Co.*, 113 Cal. 258, 261, *Temple, J.*, said: "Where a statute creates a right and prescribes a remedy for its enforcement, that remedy is exclusive. When a liability is created which is not penal, and no remedy is prescribed, the liability may be enforced wherever the person is found. The procedure will, however, be entirely governed by the law of the forum. If the law creating the liability provides for a particular mode for enforcing it, the mode limits the liability. If it be a contract, the parties here contracted with the understanding that they can be held liable in no other way. And such a liability cannot be enforced in another state," citing several cases.

54 *Bank v. Trimble*, 6 B. Mon. (Ky.) 599, 604.

ing the distinction above mentioned, reasoned as though the distinction, for the higher end of justice, ought to be disregarded. "It is not necessary," said the justice, "that the procedure to enforce the liability in question should be that required by statute in this state in the case of domestic corporations, as that would frequently be impossible and would withhold the right of comity altogether. It is sufficient if the method of procedure in our courts is such that no injustice is done to the stockholder who is sued, or to any citizen of this state, and the established policy of the state is not interfered with."⁵⁵ And in one of the most recent cases wherein the distinction was again sustained, Justice Dodge, in a dissenting opinion, ringing with sense and justice, declared that the decision destroyed a clear and absolute right by denying any remedy for its enforcement, and that, too for no better reason than mere inconvenience to courts in their procedure; an inconvenience, too, which seemed to him "rather imaginary than real. This is a result which is not to the credit of the courts"⁵⁶—a conclusion which none, save the reverential upholder of technicalities, will question.

The largest aspect of the proceeding relates neither to the proceeding, nor to state comity, but, as Morawetz so well says, "The willingness of the courts to enforce a contract validly entered into between parties in another jurisdiction. A refusal to grant a remedy in a case of this kind would not be a refusal to enforce a *foreign law*; it would be simply a denial of justice."⁵⁷ This utterance has received judicial approval.

(d.) In pursuing foreign stockholders several questions require answer. Under what conditions can this be done and what remedies can be invoked? A rule of nearly universal application may first be given. Such stockholders can be required to respond to their double liability wherever the same

⁵⁵ Howarth v. Angle, 162 N. Y. 190, 191. See opinion in Howarth v. Lombard, 175 Mass. 570, 575.

⁵⁶ Finney v. Guy, 106 Wis. 277. See a valuable opinion in Pfaff v. Gruen, 92 Mo. App. 560, showing the change of opinion on this question.

⁵⁷ 1 Private Corp. §875.

law of liability has been applied by the state to its own citizens. In other words, they may be subjected to such a liability provided it is not contrary to the policy of the state where they reside.⁵⁸ Again, in some states, double liability may be enforced by comity against its citizens even though this principle has not been adopted and applied to them in becoming members of a corporation in their own state.⁵⁹ Wherever remedies can be enforced by creditors, a bill in equity is usually brought by one or more creditors in behalf of all; for while a single creditor has been permitted in some cases to pursue a foreign stockholder,⁶⁰ more generally this permission has been denied to him for the soundest reasons. "Nothing," remarks the Supreme Court of Rhode Island, "could be more unjust than to permit a creditor or a number of creditors to recover from a foreign stockholder to the full amount of his liability, when other stockholders residing in the home state were only required to contribute a less proportion of the value of their stock." But when all the proper parties, including the bank, are joined then judgment may be obtained against the foreign stockholder. And the same principle may be applied to a stockholder who is liable for double the amount of his stock as to one whose liability is for a similar amount.⁶¹

58 *Castleman v. Templeman*, 87 Md. 546; *Howarth v. Lombard*, 175 Mass. 570; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 46.

59 In Missouri in a recent case the Supreme Court have gone still further "It does not follow that because people of this commonwealth have restricted the liability of stockholders in corporations created by virtue of their own laws to the amount of their stock, they will refuse to enforce in their courts the contracts of its own citizens who voluntarily go into other states and become stockholders in corporations under their laws which impose upon stockholders a personal liability in excess of the amount taken. Such a contract is not against public policy." *Guerney v. Moore*, 131 Mo. 650, 673. See *Childs v. Cleaves*, 95 Me. 509.

60 *Ferguson v. Sherman*, 169 Cal. 116; *Bank of North America v. Rindge*, 57 Fed. 279; *Pulsifer v. Greene*, 96 Me. 438; *Mechanics' Sav. Bank v. Fidelity Trust & Safe Dep. Co.*, 87 Fed. 113; *Guerney v. Moore*, 131 Mo. 650; *Lanigan v. North*, 69 Ark. 62, 65.

61 *Miller v. Smith*, 58 At. 634, 636; *Bates v. Day*, 198 Pa. 513; *Clark v. Knowles*, 187 Mass. 35; *Abbott v. Goodall*, 100 Me. 231; *Elkhart Nat.*

More generally, the remedy pursued is that of the forum.⁶² While a smaller number of jurisdictions are still more liberal, and permit the receiver or creditor to use the remedy of the state where the bank was located, and the contract with the stockholders had its origin and execution. This view rests on the idea that the stockholders at the time of making their contract with the bank intended or expected that the legal steps employed against resident delinquent stockholders would be applied to all in the event of the non-fulfilment of their obligations.⁶³

(e.) Lastly, the federal courts in ascertaining in what states comity exists follow the answer given by the proper state tribunals. This is a question exclusively for them to decide.⁶⁴

(f.) It may be added that a single citizen of the state where an insolvent bank is located cannot be sued in another state where he happens to be by a single creditor to enforce his double liability, because the law provides a single action by the receiver, or other proper party, against all the stockholders, for

Bank v. Northwestern Guaranty Loan Co., 87 Fed. 252; *State Nat. Bank v. Sayward*, 91 Fed. 443.

62 *Clark v. Knowles*, 187 Mass. 35; *First Nat. Bank v. Gustin Mining Co.*, 42 Minn. 327; *Merchants' Nat. Bank v. Bailey Mfg. Co.*, 34 Minn. 323; *Abbott v. Goodall*, 100 Me. 231; *Covell v. Fowler*, 144 Fed. 535.

63 *Love v. Pusey*, 3 Penn. (Del.) 577; *First Nat. Bank v. Gustin Mining Co.*, 42 Minn. 327. The extent of his individual liability as a shareholder to the creditors of the company must be determined by the laws of that state, not because such laws are in force in this state, but because he has voluntarily agreed to the terms of the company's constitution." *Ibid*, 328. While receivership proceedings were pending in a suit in a sister state against an insolvent bank, a creditor intervened in behalf of the creditors and impleaded the stockholders as parties defendant for the purpose of enforcing their statutory liability in accordance with the law of the foreign jurisdiction. The stockholders were within the jurisdiction of the court, which determined the amount due to each creditor, fixed the liability of each stockholder, and rendered judgment in favor of the creditors. Afterward they, with the receiver, were authorized to collect and distribute the amounts due to the parties beneficially interested. *Childs v. Blethen*, 82 Pa. (Wash.) 405. Furthermore, such a judgment is several against the several stockholders authorizing the creditors to sue any stockholder on the judgment. *Ibid*.

64 *Finney v. Guy*, 189 U. S. 335.

the collection of the entire liability for distribution among the creditors.⁶⁵

28. Assessment Claim. Can be Sold and Assigned.

After the amount of the liability of a stockholder has been determined, it then becomes a claim like any other against him, and can be sold and assigned by the receiver. The assignee acquires a perfect title, and should the stockholders decline to pay him, he can sue him therefor. Such a sale and transfer by the receiver may be expedient, especially when the stockholder lives in another state and proceedings against him would be costly and difficult.⁶⁶

29. Assessment to Restore Impaired Capital.

Sometimes there is an impairment of a bank's capital, which it must restore, or legally change the record to correspond with the truth.⁶⁷ An assessment for the purpose of restoring the capital of a national bank, ordered by the controller, must be made by the stockholders, consequently an assessment by the directors is void.⁶⁸ Furthermore, the assessment can be enforced only by subjecting the stock to payment, and not the owners personally.⁶⁹

30. Defences.

Besides the defences mentioned,⁷⁰ the call for additional assessments, either unpaid subscriptions or additional liability, after a bank's failure, for the benefit of its creditors, is always an unwelcome demand, and has been often resisted, in most cases for flimsy reasons. Illegal or imperfect organization of the bank has been a favorite defence, courageously but unsuccessfully made, for, if true, the objectors were guilty

65 *Eau Claire Nat. Bank v. Benson*, 106 Wis. 624.

66 *Waldron v. Alling*, 73 N. Y. App. Div. 86.

67 Rev. Stat. §5205.

68 *Commercial Nat. Bank v. Weinhard*, 192 U. S. 243, affg. 41 Or. 359; *Hulitt v. Bell*, 85 Fed. 98. See *Bank v. Johnston*, 133 Cal. 185.

69 *Hulitt v. Bell*, 85 Fed. 98.

70 See §14.

participants.⁷¹ That one was not a stockholder is another reason easily answered by showing his signature to the articles of association, and his continuous relation as a member.⁷² Nor can he escape by withdrawing or severing his legal relation by his sole action,⁷³ or by any agreement with an officer to release him from liability;⁷⁴ nor by disclosing and proving the improper management of the bank;⁷⁵ nor by showing that he was led to purchase stock by the fraudulent representations of its officers.⁷⁶ Other defences equally disappointing are the repeal of statutory liability;⁷⁷ non-payment for stock,⁷⁸

71 *Chaffin v. Cummings*, 37 Me. 67, 83; *Chester Glass Co. v. Dewey*, 16 Pick. (Mass.) 94; *Schaeffer v. Mo. Home Ins. Co.*, 46 Mo. 248; *Selma & Tenn. R. v. Tipton*, 5 Ala. 787, 807; *Lehman v. Warner*, 61 Ala. 455; *Marion Sav. Bank v. Dunkin*, 54 Ala. 471; *Palmer v. Lawrence*, 3 Sand. (N. Y.) 161. For example, the failure of a bank to pay a bonus required before organizing is no defence. *Murphy v. Wheatley*, 63 At. (Md.) 62. The defect, so far as the stockholder is concerned, is cured by his subsequent acceptance of stock and dividends. *Ibid.* See *Hammond v. Strauss*, 53 Md. 1, also §14c.

72 *Thompson v. Reno Sav. Bank*, 19 Neb. 103.

73 *Selma* case, 5 Ala. 787; *Schaeffer* case, 46 Mo. 248; *Lehman* case, 61 Ala. 455. See cases in note, 3 Am. St. Rep. 821.

74 *Litchfield Bank v. Church*, 29 Conn. 137; *Palmer v. Lawrence*, 3 Sand. (N. Y.) 161; *Valk v. Crandall*, 1 Sand. Ch. (N. Y.) 179; *Sagory v. Dubois*, 3 Sand. Ch. 466; *Putnam v. Hutchinson*, 4 Kan. App. 273; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46, 65; *Thompson v. Reno Sav. Bank*, 19 Neb. 103; *Farmers' & Mech. Bank v. Jenks*, 7 Met. (Mass.) 592; *Alibone v. Hager*, 46 Pa. 48. See cases in note, 3 Am. St. Rep. 823.

75 *Ross v. Bank*, 20 Nev. 191; *Dayton v. Borst*, 7 Bos. (N. Y.) 115, 121. "Stockholders cannot set up the illegal acts of the directors, their agents, to defeat an executed contract of the corporation, within its chartered powers, made with an innocent party, nor to relieve themselves from legal liability as stockholders to such party." *Maine Trust & Bkg. Co. v. Southern Loan & Trust Co.*, 92 Me. 444, 450, citing *Newcomb v. Reed*, 12 Allen (Mass.) 362; *Wiswell v. Starr*, 48 Me. 401, 405; *Perkins v. Portland R. Co.*, 47 Me. 573; *Walworth v. Brackett*, 98 Mass. 98.

76 *Bissell v. Heath*, 98 Mich. 472; *In re Empire City Bank*, 6 Abb. Pr. (N. Y.) 385.

77 *Farmers' & Mech. Bank v. Jenks*, 7 Met. (Mass.) 592.

78 *Spear v. Crawford*, 14 Wend. (N. Y.) 20; *Mitchell v. Beckman*, 64 Cal. 117; *Chafin v. Cummings*, 37 Me. 76, 83. "A corporation may give credit for its stock. . . . Nor is it necessary that certificates should have been issued. These only constitute proof of property, which may exist

or the required amount,⁷⁹ or in notes instead of money;⁸⁰ non-receipt of the certificate,⁸¹ or not properly assigned;⁸² that the owner was the holder of stock which had been surrendered and reissued;⁸³ that his stock was issued to him after the creation of the debt for which he is held liable;⁸⁴ and that the bank began business before the legal amount of capital had been paid.⁸⁵

But a discharge in bankruptcy is a good defence to an unpaid subscription to the stock of a bank that became insolvent before the filing of a bankruptcy petition.⁸⁶

31. Set-off.

(a.) The defence of set-off requires further consideration. A stockholder who is indebted on his unpaid subscription cannot set off a debt due from the corporation, because his debt is a trust fund for creditors that cannot be impaired by such a procedure.⁸⁷

without them. When the corporation has agreed that a person shall be entitled to a certain number of shares in its capital, to be paid for in a manner agreed upon, and that person has agreed to take and pay for them accordingly, he becomes their owner by a valid contract, made upon a valuable consideration." *Ibid.*

⁷⁹ *Ross v. Bank*, 20 Nev. 191.

⁸⁰ *Finnell v. Sandford*, 17 B. Mon. (Ky.) 748; *Farmers' & Mech. Bank v. Jenks*, 7 Met. (Mass.) 592; *Selma & Tenn. R. v. Tipton*, 5 Ala. 787, 807, containing cases sustaining the opposite view.

⁸¹ *Schaeffer v. Mo. Home Ins. Co.*, 46 Mo. 248; *Chester Glass Co. v. Dewey*, 16 Pick. (Mass.) 94; *Mitchell v. Beckman*, 64 Cal. 117.

⁸² *Mitchell v. Beckman*, 64 Cal. 117; *Bissell v. Heath*, 98 Mich. 472.

⁸³ *In Matter of Reciprocity Bank*, 22 N. Y. 9.

⁸⁴ *Barrick v. Gifford*, 47 Ohio St. 180.

⁸⁵ *Maine Trust & Bkg. Co. v. Southern Loan & Trust Co.*, 92 Me. 444.

⁸⁶ *Carey v. Mayer*, 79 Fed. 926, and cases cited; *South Staffordshire Railway Co. v. Burnside*, 5 Ex. (Eng.) 129.

⁸⁷ See §8. *Sawyer v. Hoag*, 17 Wall. (U. S.) 610; *Scovill v. Thayer*, 105 U. S. 143; *Bausman v. Kinnear*, 24 C. C. A. 473, revg. 73 Fed. 69; *Thompson v. Reno Sav. Bank*, 19 Nev. 103; *Bates v. Lewis*, 3 Ohio St. 459; *Efird v. Piedmont Land Co.*, 55 S. C. 78; *Macungie Sav. Bank v. Bastian*, 10 Pa. Week. Notes, 71; *Humboldt Safe Dep. Co.'s Estate*, 3 Pa. Co. Ct. 621; *Whittington v. Farmers' Bank*, 5 Har. & J. (Md.) 489; *Colorado Fuel Co. v. Sedalia Smelting Co.*, 13 Colo. App. 474, 479; *Singer v. Given*, 61 Iowa 93; *Boulton Carbon Co. v. Mills*, 78 Iowa 460; *Buchanan v. Meis-*

(b.) For the same reason, the double liability fund that is to be collected by assessment cannot be set off against a debt due from the bank; every stockholder must pay his proportion, and then look to the fund for the satisfaction of his debt.⁸⁸ This is the sounder rule, otherwise the actual and contingent fund on which the credit of a corporation is based, may prove a delusion.⁸⁹

ser, 105 Ill. 638; *Shields v. Hobart*, 172 Mo. 492; *Shickle v. Watts*, 94 Mo. 410; *Williams v. Traphagen*, 38 N. J. Eq. 57; *McAvity v. Lincoln Paper Co.*, 82 Me. 504; *Wheeler v. Millar*, 90 N. Y. 353; *Wilkinson v. Bertock*, 111 Ga. 187; *Richardson v. Merritt*, 94 Minn. 354; *Indiana Novelty Co. v. McGill*, 15 Ind. App. 1; *Liquidators of Maritime Bank v. Troop*, 16 S. C. (Can.) 456; *Barnett's Case*, L. R. 19 Eq. (Eng.) 449; *Calisher's Case*, L. R. 5 Eq. 214.

Contra.—*Salina Nat. Bank v. Prescott*, 60 Kan. 490, 495.

88 *Matter of Empire City Bank*, 18 N. Y. 199; *Shickle v. Watts*, 94 Mo. 410; *Parker v. Carolina Sav. Bank*, 53 S. C. 583; *Ball Electric Light Co. v. Child*, 68 Conn. 522; *Matthews v. Albert*, 24 Md. 527; *Buchanan v. Meisser*, 105 Ill. 638; *Humboldt Safe Dep. Co.'s Assigned Estate*, 3 Pa. Co. Ct. 621; *Mechanics' Sav. Bank v. Fidelity Trust Co.*, 87 Fed. 113.

The same rule applies to a national bank. *Lantry v. Wallace*, 38 C. C. A. 510; *Delano v. Butler*, 118 U. S. 634; *Wingate v. Orchard*, 21 C. C. A. 315.

Contra.—*Boyd v. Hall*, 56 Ga. 563; *Pierce v. Topeka Com. Security Co.*, 60 Kan. 164; *Abbey v. Long*, 44 Kan. 688; *Musgrave v. Glen Elder Assn.*, 5 Kan. App. 393; *Jerman v. Benton*, 79 Mo. 148; *Am. Mortgage Co. v. Brower*, 32 So. (Miss.) 906; *Strauss v. Denny*, 95 Md. 690; *Cahill v. Original Big Gun Assn.*, 94 Md. 353, and cases cited. See *Gauch v. Harrison*, 12 Ill. App. 457, and note, 6 Am. & Eng. Corp. Cases (N. S.) 730.

In Kansas, a stockholder who has paid a bona fide claim against his bank, can avail himself of this as a defence to his statutory liability. *Campbell v. Reese*, 8 Kan. App. 518; *Kendall v. Underhill*, 8 Kan. App. 521. But he cannot set off an unmatured indebtedness against such a liability. *Mechanics' Sav. Bank v. Fidelity Trust Co.*, 87 Fed. 113.

89 In *Bausman v. Kinnear*, 24 C. C. A. 473, revg. 73 Fed. 69, *Gilbert, Cir. J.*, said: "A stockholder who is also a creditor of a corporation has no right to set off as against his unpaid subscription, after the corporation has become insolvent. . . . The unpaid stock is held to be a trust fund for the purpose of paying the debts of the corporation, and as such it must be distributed among the creditors pro rata. The debt due to a stockholder is entitled to no preference over other debts, and he cannot require its payment by way of set-off, to the exclusion or postponement of other claims. The reason usually assigned for this rule is that the debt owing by the stockholder to the corporation after insolvency and that owing from

(c.) In one of the early double liability cases, decided by the Court of Appeals of Maryland, the distinction was clearly seen between a stockholder's liability to his bank and to its creditors. If his indebtedness to the bank concerns only the institution, which is the case always during its solvency, then he may set off the bank's indebtedness to him, like any other debtor; but when the bank is insolvent, then his indebtedness for unpaid stock and his double liability is a trust fund for its creditors which they may rightfully demand freed from all questions of indebtedness between his bank and himself. They have given the bank credit, relying on this fund, and it may be hardly less than a fraud to cut it down by showing an indebtedness of the bank to the stockholder. The entire amount, including the double liability, might in that way be dissipated.⁹⁰

(d.) Again, in Illinois, a set-off may be granted for a credit in favor of a stockholder against his indebtedness for his unpaid stock, and denied him against his indebtedness for his double liability, because of the mutuality of obligations in the one case and not in the other. This distinction has been noted on some occasions,⁹¹ and need not be further considered. The set-off in both cases is contrary to the general rule.

(e.) So well established is this rule that a stockholder cannot have a preferred claim even set off against his assessment.⁹² But when the money due to a creditor on his preferred claim has been used in enforcing assessments and in

the corporation to him are not in the same right, the former being a debt payable to a trust fund. The decisions upon this proposition appear to be unanimous. The reason of the rule applies to all cases of simple indebtedness from the corporation to a stockholder, and upon principle no distinction can be made on account of the purpose for which the debt was incurred, or the motives that prompted the stockholder to become creditor."

90 *Matthews v. Albert*, 24 Md. 257. See §1.

91 *Buchanan v. Meisser*, 105 Ill. 638. In Illinois a stockholder may buy up claims against the bank for the purpose of having them set off, but he will be allowed only the sum he paid for them. *Gauch v. Harrison*, 12 Ill. App. 457. The same rule applies in Kansas. *Salina Nat. Bank v. Prescott*, 60 Kan. 490, 495.

92 *Sioux City Stock Yard Co. v. Fribourg*, 121 Iowa 231.

paying other expenses of administration, the amount thus due is entitled to a preference out of the double liability fund.⁹³

(f.) As equitable defences are not permitted in actions at law in the federal courts, an equitable set-off not arising out of any provision of a state statute creating the double liability of a stockholder cannot be considered in an action to enforce his liability.⁹⁴

(g.) As set-off is a mode of defence, and pertains to the remedy, it is governed by the law of forum.⁹⁵ This is the ancient law. But on some occasions it has been regarded as an element of the *lex loci contractus*, and the foreign rule has been applied.⁹⁶ This is the only reason why the federal courts and those of some of the states have permitted a set-off to be made, which would not have been permitted had the contract been made between a bank and individual, both citizens of their own state.⁹⁷

32. Duration of Liability of Home Stockholder.

The duration of the liability of stockholders will now be considered. The inquiry is two-fold, for subscriptions and for their double liability.

(a) Their liability for unpaid stock, so Justice Clayton has declared, is "a continuing, subsisting trust and confidence to which the statute of limitations has no application."⁹⁸ Subscribers are therefore deemed to hold their stock for their bank, subject to its call.⁹⁹ This rule, though, is not universal,

⁹³ Ibid.

⁹⁴ *Platt v. Larter*, 94 Fed. 610; *Mechanics' Sav. Bank v. Fidelity Ins. & Trust Co.*, 87 Fed. 113.

⁹⁵ *Bank v. Trimble*, 6 B. Mon. (Ky.) 599, 601.

⁹⁶ *Fidelity Trust Co. v. Mechanics' Sav. Bank*, 38 C. C. A. 193, revg. 91 Fed. 456; *Broadway Nat. Bank v. Baker*, 176 Mass. 294. See *Brown v. Trail*, 89 Fed. 641.

⁹⁷ Ibid.

⁹⁸ *Payne v. Bullard*, 23 Miss. 88, 90. See a full note, 96 Am. St. Rep. 983.

⁹⁹ *Hawkins v. Glenn*, 131 U. S. 319; *Hatch v. Dana*, 101 U. S. 205; *Scovill v. Thayer*, 105 U. S. 143, 145; *Glenn v. Liggett*, 135 U. S. 533, 542; *Calloway v. Glenn*, 105 Ky. 648; *Fitzgerald v. Union Sav. Bank*, 65 Neb.

some courts holding that a call for unpaid stock after six years or other statutory limitation, unless a demand has been made within the statutory limitation, is barred.¹

As national bank stockholders are required to pay for their stock within six months after organizing the bank, no litigation has arisen from their failure to comply with the law.

The above rule applies between stockholders and a living bank. If any portion of one's stock remains unpaid after the bank's declared insolvency, by one rule the statute begins to run against the indebted stockholder from that event;² by the other rule from the time of ascertaining the amount due the bank's creditors and exhausting its property to pay them,³ or more precisely, the date of the call.⁴

(b.) In considering their liability for assessments, national bank stockholders will first be considered. Two questions require answer: What statute applies to them; and when does it begin to act. Both questions are easily answered. The

97; *Gold v. Paynter*, 101 Va. 714; *Williams v. Taylor*, 120 N. Y. 244; *West v. Topeka Sav. Bank*, 66 Kan. 524; *Hawkins v. Donnerberg*, 4 Or. 97; *Washington Sav. Bank v. Butchers & Drovers' Bank*, 107 Mo. 133; *Glenn v. Williams*, 60 Md. 93; *Glenn v. Semple*, 80 Ala. 159; *Glenn v. Howard*, 81 Ga. 383, 385; *Herman v. Page*, 62 Cal. 448; *Marr v. Bank*, 4 Lea (Tenn.) 579; *Crofoot v. Thatcher*, 19 Utah 212, citing many cases; *Kilbreath v. Gaylord*, 34 Ohio St. 305; *Union Sav. Bank v. Leiter*, 145 Cal. 696. And an assessment followed by a notification to stockholders, which is rescinded, does not put the statute into operation. *Ibid*.

1 *Bank v. Gilmore*, 8 Ohio 62, 71; *Franklin Sav. Bank v. Bridges*, 20 Pa. Week. Notes 43; *Shackamaxon Bank v. Disston*, 2 Ry. & Corp. L. J. (Pa.) 62. See *Swearingen v. Sewickley Dairy Co.*, 198 Pa. 68.

2 *Franklin Sav. Bank v. Bridges*, 8 At. (Pa.) 611; *Swearingen v. Sewickley Dairy Co.*, 198 Pa. 68; *West v. Topeka Sav. Bank*, 66 Kan. 524, 531, and cases cited; *First Nat. Bank v. Greene*, 64 Iowa 445; *Chilberg v. Siebenbaum*, 84 Pac. (Wash.) 598, and cases cited. See note, 3 Am. St. Rep. pp. 827-833.

3 *Pelt v. Gardner*, 54 Neb. 701; *King v. Pony Gold Mining Co.*, 28 Mont. 74; *Christensen v. Quintard*, 36 Hun (N. Y.) 334.

4 *Glenn v. Marbury*, 145 U. S. 499; *Hawkins v. Glenn*, 131 U. S. 319; *Scovill v. Thayer*, 105 U. S. 143; *McCarter v. Ketcham*, 62 At. (N. J.) 693; *Gold v. Paynter*, 101 Va. 714; *Glenn v. Williams*, 60 Md. 93; *Glenn v. Semple*, 80 Ala. 159.

statute of the state where the bank lives,⁵ which begins to run as soon as the liability of the bank's stockholders is judicially determined,⁶ in other words, from the time the controller orders the payment of an assessment.⁷ An action begun after that period cannot therefore be sustained.⁸ Nevertheless, their liability cannot be indefinitely prolonged should the controller not give the order.⁹ But the period of limitations in such cases has not been judicially determined.

(c.) The duration of the liability of state bank stockholders varies in different states from two to six years, beginning with different events; the incurring of indebtedness,¹⁰ the bank's dissolution,¹¹ its failure¹² regardless of the maturity or

5 U. S. Rev. Stat. §721; *Campbell v. Haverhill*, 155 U. S. 610, 614; *Aldrich v. Skinner*, 98 Fed. 375; *Aldrich v. McClaine*, 98 Fed. 378; *Butler v. Poole*, 44 Fed. 586; *McClaine v. Rankin*, 197 U. S. 154.

6 *Price v. Yates*, 7 Pa. Week. Notes 51; *McClaine v. Rankin*, 197 U. S. 154.

7 *Rankin v. Barton*, 199 U. S. 228, revg. 69 Kan. 629; *McDonald v. Thompson*, 184 U. S. 71; *Glenn v. Marbury*, 145 U. S. 499; *Hawkins v. Glenn*, 131 U. S. 319; *Thompson v. German Ins. Co.*, 76 Fed. 892; *De Weese v. Smith*, 45 C. C. A. 408, revg. 97 Fed. 309; *Aldrich v. Yates*, 95 Fed. 78; *Aldrich v. Skinner*, 98 Fed. 375; *Aldrich v. McClaine*, 98 Fed. 378; *Van Pelt v. Gardner*, 54 Neb. 701; *Beckham v. Hague*, 38 N. Y. Misc. 606, 609.

8 *Butler v. Poole*, 44 Fed. 586.

9 *Rankin v. Barton*, 199 U. S. 228, revg. 69 Kan. 629. See *King v. Pomeroy*, 58 C. C. A. 209.

10 *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407; *Bank v. Pacific Coast Steam Co.*, 103 Cal. 594; *Winona Wagon Co. v. Bull*, 108 Cal. 1; *Goodall v. Jack*, 127 Cal. 258; *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Hardman v. Sage*, 124 N. Y. 25, affg. 47 Hun 230; *Close v. Potter*, 155 N. Y. 145, revg. 11 Misc. 729; *Union Bank v. Wando Mining Co.*, 17 S. C. 339; *Brigham v. Nathan*, 62 Kan. 243; see *First Nat. Bank v. King*, 60 Kan. 733. Thus in California the liability of stockholders to the depositors of a bank is barred within three years from the date of the deposit. *Nellis v. Pacific Bank*, 127 Cal. 166; *Wells v. Black*, 117 Cal. 157. See *Boor v. Tolman*, 113 Ill. App. 322. Wherever the principle is applied the extension by a creditor of his debt against the bank does not interrupt the running of the statute on the original claim. *Santa Rosa Nat. Bank case*, 125 Cal. 407, and cases cited.

11 *Cottrell v. Manlove*, 58 Kan. 405; *Bennett v. Thorne*, 36 Wash. 253. See note 19.

12 *Carrol v. Green*, 92 U. S. 509; *Terry v. Tubman*, 92 U. S. 156; *God-*

non-maturity of its indebtedness;¹³ the suspension of business for a year or other fixed period.¹⁴ And wherever this rule exists, as a cause of action against the bank is barred at the end of three years after suspending business, the same rule applies to a stockholder even though no action can be begun against him until a year after the bank's suspension.¹⁵

The limitation applies only to indebtedness of the bank that is absolute and conditional. Therefore, if a bank is merely a guarantor of an unmatured obligation of another, the statute does not begin to run in favor of a stockholder until the liability of the corporation has become fixed by the default of the principal debtor.¹⁶

(d.) Another rule has often been applied: Wherever a stockholder's liability is regarded as secondary, the courts, following the rule that applies to guarantors, have declared that his liability does not become fixed until after obtaining judgment against the bank and issuing execution therefor, which

frey v. Terry, 97 U. S. 171; *Terry v. McClure*, 103 U. S. 442; *West v. Topeka Sav. Bank*, 66 Kan. 524; *Hawkins v. Furnace Co.*, 40 Ohio St. 507; *Parker v. Carolina Sav. Bank*, 53 S. C. 583.

13 *McHale v. Moore*, 66 Kan. 267; *Crissey v. Morrill*, 60 C. C. A. 460.

14 *Platt v. Hungerford*, 116 Fed. 771; *Seattle Nat. Bank v. Pratt*, 103 Fed. 62; *First Nat. Bank v. King*, 60 Kan. 733; *Brigham v. Nathan*, 62 Kan. 243; *Crocker v. Ball*, 59 Pac. (Kan.) 733; *Dawson v. Sholley*, 4 Kan. App. 367.

15 *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102, 104. In this case *Greene, J.*, said: "The stockholder standing in the relation of surety to the corporation, his liability must cease when the liability of the corporation no longer exists. Manifestly, and in conformity to well-recognized legal principles, no action can be maintained against a surety unless the liability of the principal exists at the time the action is commenced." *Winona Wagon Co. v. Bull*, 108 Cal. 1; *Goodall v. Jack*, 127 Cal. 258.

In receivership proceedings against a bank, a court made an interlocutory order determining who were creditors and who were stockholders, the amount for which each stockholder was liable, providing for the enforcement of the liability, and retaining jurisdiction for that purpose. At the time of making the order the court had jurisdiction of the stockholders. It was held that though six years had nearly elapsed before the entry of a final judgment against the stockholders, the court had not lost jurisdiction. *Childs v. Blethen*, 82 Pac. (Wash.) 405.

16 *Crissey v. Morrill*, 60 C. C. A. 460; *McHale v. Moore*, 66 Kan. 267.

is returned unsatisfied.¹⁷ But this rule has been gradually supplanted by another, more in harmony with the swifter and improved methods of redress, that the judicial determination of a corporation's insolvency is equivalent to the execution of a judgment against it,¹⁸ and the statute therefore begins to operate from that event.

(e.) Lastly, as their liability for the bank's indebtedness is contractual, and not penal, it is not extinguished by a judgment of forfeiture against the institution,¹⁹ nor by a repeal of its charter,²⁰ and of the statute under which their liability has been incurred.²¹

(f.) On the death of stockholders, their liability for assessments in most states by statute survives and may be enforced against their representatives.²² This also is the national law.²³

33. Duration of Liability of Foreign Stockholder.

Lastly, what statute shall be applied to a foreign stockholder? By one rule, the statute of the state where the bank was located, if specifically limiting the liability of its members, will be applied.²⁴ The reason is apparent. As the statute forms the basis of his contract, its duration is one of its elements, and must be regarded as fully as any other.

17 *Handy v. Draper*, 89 N. Y. 334; *Rocky Mt. Bank v. Bliss*, 89 N. Y. 338; *Lindsley v. Simonds*, 2 Abb. (N. S.) 69; *Hale v. Cushman*, 96 Me. 148; *Bank v. Rindge*, 57 Fed. 279.

18 *Hirshfeld v. Bopp*, 145 N. Y. 84; *Barrick v. Gifford*, 47 Ohio St. 180; *Bennett v. Thorne*, 36 Wash. 253, 265, citing many cases.

19 *Appeal of Gunkle*, 48 Pa. 13. See U. S. Rev. Stat. §5239.

20 See §11.

21 See §17.

22 *Gianella v. Bigelow*, 96 Wis. 185; *Gager v. Paul*, 111 Wis. 638; *Barton Nat. Bank v. Atkins*, 72 Vt. 33; *Lanigan v. North*, 69 Ark. 62; *Fidelity Trust Co. v. Mechanics' Sav. Bank*, 38 C. C. A. 193.

23 Rev. Stat. §5152; *Richmond v. Irons*, 121 U. S. 27, 55; *Witters v. Sowles*, 32 Fed. 130; *Parker v. Robinson*, 33 U. S. App. 368; *Blackmore v. Woodward*, 18 C. C. A. 57; *Wickham v. Hull*, 60 Fed. 326; *Tourtelot v. Finke*, 87 Fed. 840; *Davis v. Weed*, 44 Conn. 569.

24 A federal court is not deprived of jurisdiction of a suit against the executors of an estate even if it be in the possession of a state probate court. *Wickham v. Hull*, 60 Fed. 326.

But when the duration of his liability is not thus determined, the statute of the forum must be applied.²⁵

34. Liability of Stockholders Who Continue the Bank Beyond the Legal Period.

Finally, the stockholders of a bank may continue the business beyond the legal period for which the bank was created. Whenever they do this they are liable as partners.²⁶

35. Voluntarily Liquidating.

The national law provides that banks may voluntarily liquidate;²⁷ but in such cases their members are liable for additional contributions, if needed, to discharge the indebtedness of the bank.²⁸ The notes of a bank given when embarrassed, that afterward voluntarily liquidates, are valid obligations that can be enforced against the stockholders, including any one who may have voted against liquidating.²⁹

36. Contributions Among Stockholders.

Under some conditions a stockholder may maintain an action against his associates for a contribution. Thus, for the discharge of a debt which all the stockholders have incurred, he can compel them to refund their respective proportions.³⁰ And

²⁵ Crofoot v. Thatcher, 19 Utah 212, 221; Whitman v. Citizens' Bank, 110 Fed. 503; Schiffer v. Trustees of Columbia College, 87 Fed. 166.

²⁶ National Union Bank v. Landon, 45 N. Y. 410; Bank v. Monteath, 1 Denio (N. Y.) 402.

²⁷ Rev. Stat. §§5220, 5221; Act of June 30, 1876, 19 Stat. at Large, 44 Cong. 1 Sess. Ch. 156, Sec. 2.

²⁸ Wyman v. Wallace, 201 U. S. 230, affg. 68 C. C. A. 40. See Richmond v. Irons, 121 U. S. 27, 49.

²⁹ Poppleton v. Wallace, 201 U. S. 245, affg. 68 C. C. A. 40.

³⁰ Bennison v. McConnell, 56 Neb. 46. In a recent case a stockholder conveyed land to his bank to cover an impairment of capital. He was to be paid out of its future earnings. He afterward released his right to them on the promise of the bank examiner that he would not interfere with its management. Subsequently a receiver was appointed. As payment to the stockholder was to be made in the manner described he had no lien on the land for the price. Any liability therefore to him, so the court held, was personal from the other stockholders. Brown v. Bradford, 103 Iowa 378; Redington v. Cornwell, 90 Cal. 49; Matthews v. Albert, 24 Md. 527;

if he pays his own and another stockholder's proportionate share of corporate debts, in order to protect his own interest in the corporate property, he may be subrogated to the rights and remedies of the creditor to enforce a just contribution from such stockholders.³¹

37. Liability of Private Banker.

The liability of private bankers is determined by the law of partnership.³² And if a private association is organized like a corporation with shares, which are transferred and recorded in a book kept for that purpose, a purchaser is not liable for the pre-existing indebtedness of the association.³³ The partnership changes on each transfer of stock, and though in appearance it remains the same, in law the claims of the old partnership cannot be collected from the new. An incoming partner is as little bound for the payment of an old debt as an old creditor is bound to look to him for payment. Each successive firm is liable for the payment of its own debts, and the assets of each firm, while kept intact, belong first to the creditors of such firm, but when they become the property of the succeeding firm, its creditors have the sole right thereto, and the old creditors must look to the individuals who composed the old firm for payment.³⁴

Hinshaw v. Austin, 64 Kan. 460; *Umsted v. Buskirk*, 17 Ohio St. 113; *Aspinwall v. Sacchi*, 57 N. Y. 331. See *Stewart v. Lay*, 45 Iowa 604; *Derry v. Bank of Cape Fear*, 20 Fed. 777.

³¹ *Redington v. Cornwell*, 90 Cal. 49.

³² See Chap. VIII, §43. *Shamburg v. Ruggles*, 83 Pa. 148; *Shamburg v. Abbott*, 112 Pa. 6. See §14c.

³³ *Christy v. Sill*, 131 Pa. 492; *Babcock v. Stewart*, 58 Pa. 79.

³⁴ *Christy v. Sill*, 131 Pa. 492, 503, and cases cited.

CHAPTER VI.

AUTHORITY TO RECEIVE DEPOSITS.

- | | |
|--|---|
| <ol style="list-style-type: none">1. Relationship between bank and depositor.2. General deposit is more than a loan.3. Authority to receive special and contingent deposits.4. Deposits by trustees, executors, guardians, administrators, etc.5. Bank may select depositors.6. Cannot receive deposits when insolvent.7. Construction of prohibitory statutes.8. Nature of act by bank irregularly organized.9. When can deposit, or substitute be recovered.<ol style="list-style-type: none">a. There must have been an actual deposit. | <ol style="list-style-type: none">b. If mingled in an existing fund it can be recovered.c. Effect of reducing and subsequently increasing fund.d. General deposit cannot be depleted to pay trust depositor.e. Trust check must be returned, or amount, if collected after bank's failure.f. Deposit continued by false representation of bank's solvency is not a trust deposit. <ol style="list-style-type: none">10. Pleading.11. Duration of officer's liability.12. What banks and bankers are included by statute and common law. |
|--|---|

1. Relationship Between Bank and Depositor.

A bank is legally viewed in a double aspect, as a bailee and as a debtor. In receiving a special deposit that is to be returned, like a bond or certificate of stock, a bank is a bailee, and governed by the law pertaining to that relation. In receiving money on general deposit, a bank is a debtor, consequently when it is lost, no matter what may be the cause, by improvident lending or theft, by fire or other physical destruction, the bank must respond, like an ordinary borrower of money. Again, the depositor does not expect to receive the identical money deposited, but other money of equal value.¹

¹ *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Matter of Patterson*, 18 Hun (N. Y.) 221; *Downes v. Phoenix Bank*, 6 Hill (N. Y.) 297; *Com-*

2. General Deposit is More Than a Loan.

Nevertheless, the law regards a general deposit as something more than a loan.² If an individual should borrow on time from another and spend all the money in one hour in speculation or in betting at a horse-race, the lender would have no immediate cause of action against the borrower. But a bank, notwithstanding its relationship towards its creditor, can make no such free use of the borrowed money. It is a borrower with restrictions on its power to lend; and these flow out of the conception that the bank, after all, is the keeper of the depositor's money, and this conception is strengthened by the fact that nothing usually is paid directly for the use of the loan.³

3. Authority to Receive Special and Contingent Deposits.

While the authority of a bank to receive general deposits has always existed, its authority to receive special deposits has on some occasions been questioned,⁴ especially that of national banking associations.⁵ Though not enumerated among their specific powers, the doubt concerning their right was long ago settled in their favor.⁶

In like manner a bank has a right to receive the deposit of

mercantile Nat. Bank v. Henninger, 105 Pa. 496; Keene v. Collier, 1 Met. (Ky.) 415, 438.

² See Chap. XIII. §2.

³ "The contract of deposit is a loan; but not a loan pure and simple. On the acceptance of the deposit, a promise is raised that the bank will repay it on demand, or at the time stipulated; and to that extent the transaction is a loan. But when this much is said, the whole contract is not stated. Here is my money; in consideration of its reception, and such interest as you pay, you can have its use; but only on this condition, that the use conform to the safeguards provided by the law. The acceptance of money thus tendered, implies that the bank and its directors, so far as they are responsible for the doings of the bank, agree to conform to the conditions named." *Boyd v. Schneider*, 65 C. C. A., 209, 212.

⁴ *Foster v. Essex Bank*, 17 Mass. 479.

⁵ *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; *Wiley v. First Nat. Bank*, 47 Vt. 546; *Whitney v. First Nat. Bank*, 50 Vt. 388; *Weckler v. First Nat. Bank*, 42 Md. 581.

⁶ *First Nat. Bank v. Graham*, 100 U. S. 699; *Patterson v. Syracuse Nat. Bank*, 80 N. Y. 82, containing a review of authorities; see also *First Nat. Bank v. Zent*, 39 Ohio St. 105.

a fund in controversy, to abide the event of litigation or an award, or to become payable on a contingency to some other person than the depositor.⁷

Again, a bank ordinarily need not question the source whence a depositor derived his money. It may even receive a deposit from a gambler, suspecting or believing he won it by gaming or some other questionable method. But a bank crosses the forbidden line when, "with the conscious knowledge that the depositor is obtaining the money by fraud or theft," it aids him in thus getting it from others.⁸

4. Deposits by Trustees, Executors, Guardians, Administrators, etc.

An administrator, executor, guardian, or other trustee may deposit funds in possession temporarily in a bank while awaiting investment or distribution, partly for the purpose of their safekeeping and partly to derive an income therefrom.⁹ In a recent case the court declared that the trustee "will be held to that degree of care, at least, that prudent and cautious business men ordinarily exercise in their own affairs. But this duty is not discharged by depositing the funds in any bank. Nor would it be depositing it without inquiry or investigation as to the standing of the depository. He must have reasonable grounds to believe, and in good faith believe, the institution to be solvent, before he deposits the estate's funds with it."¹⁰

He must therefore exercise proper care in selecting the depository.¹¹ He should not select one in another state.¹² Hav-

7 *Bushnell v. Chautauqua Co. Nat. Bank*, 74 N. Y. 290; *Kansas Nat. Bank v. Quinton*, 57 Kan. 750; *Brown v. Kinsley Ex. Bank*, 51 Kan. 359; *American Nat. Bank v. Presnall*, 58 Kan. 69; *Pollock v. Carolina B. & L. Assn.*, 51 S. C. 420.

8 *Wright v. Stewart*, 130 Fed. 905, 914. See Chap. XVI. §3.

9 *Germania Safety Vault and Trust Co. v. Driskell*, 66 S. W. (Ky.) 610.

10 *Ibid.* See Chap. XIII, §21.

11 *In re Post's Estate*, Myrick, Prob. (Cal.) 230; *In re Law's Estate*, 144 Pa. 499; *State v. Gooch*, 97 N. C. 186.

12 *State v. Gooch*, 97 N. C. 186; *Moore v. Eure*, 101 N. C. 11. The soundness of this position may be questioned; the state fence is no protection. On one occasion a guardian deposited his ward's money with a

ing made a proper selection, he is relieved, unless the institution at a later period becomes unsafe and he is negligent in not learning of its changed condition. A deposit made by judicial order furnishes complete protection.¹³

The deposit must be made in a way to indicate its true trust character. A guardian or other trustee who makes the deposit in his own name, whatever be his intention, is liable for the consequences.¹⁴ "No matter what he intends to do," says Justice Porter, "or what the cashier or clerk may think he is doing, the deposit must wear the impress of the trust. . . . He cannot so enter them as to call them his own to-day if they are good, and to-morrow, if bad, ascribe them to the estate, or shift them in an emergency from one estate to another."¹⁵ In some jurisdictions a less stringent rule has been applied, but it ought not to be favored.¹⁶ Furthermore, to permit a depositor to set aside the entry of his deposit by showing that really the deposit belonged to another, or vice versa, is a dangerous proceeding.¹⁷ Such evidence might be safely used to show that a mistake had been made in entering the deposit, but it ought not, we think, to be employed for any other purpose.

5. Bank May Select Depositors.

A bank is required to keep the deposits only of those persons whom it wishes to serve,¹⁸ and may close an account at

banking firm of which he was a member, but the impropriety of the act was not questioned. *Ogburn v. Wilson*, 93 N. C. 115 and 96 N. C. 211.

13 *O'Hara v. Shepherd*, 3 Md. Ch. 306. See *State v. Gooch*, 97 N. C. 186.

14 *Booth v. Wilkinson*, 78 Wis. 652; *Williams v. Williams*, 55 Wis. 300, reviewing many decisions; *Mason v. Witthorne*, 2 Cold. (Tenn.) 242; *Jenkins v. Walter*, 8 Gill & J. (Md.) 218; *Norris v. Hero*, 22 La. Ann. 605; *Robinson v. Ward*, 2 Car. & Payne, (Eng.) 59.

Contra.—*Parsley v. Martin*, 77 Va. 376.

15 *McAlister v. Commonwealth*, 30 Pa. 536, 538; *Estate of Law*, 14 Pa. 499.

16 *Parsley v. Martin*, 77 Va. 376; *Beasley v. Watson*, 41 Ala. 234.

17 *Ibid.*

18 *Thatcher v. Bank*, 5 Sand. (N. Y.) 121; *People v. Bank of North America*, 75 N. Y. 547, 563. See Chap. XIII. §3.

any time by tendering the amount due and declining to receive more.¹⁹ Some banks decline to open accounts with depositors who are in every way worthy because they do not expect to keep a deposit large enough to be remunerative.

6. Cannot Receive Deposits When Insolvent.

An insolvent bank has no right to receive a deposit. By common law and statute bank officers are liable, civilly and criminally, for receiving deposits when their institutions are in this condition.²⁰ Of late, statutes of this nature have been generally enacted, which apply also to private banks and bankers. Such legislation is constitutional, nor is a statute declaring that the failure, suspension, or involuntary liquidation of a banker within thirty days, or other fixed period, *prima facie* evidence of his intent to defraud, unconstitutional in depriving him of the presumption of innocence.²¹ Furthermore, a state law aimed at banks for receiving deposits when insolvent does not apply to national banking associations or other officers.²²

7. Construction of Prohibitory Statutes.

In construing these statutes, the place where the deposit was received is not essential,²³ nor the receiver.²⁴ Officers who

19 *Chicago Marine & Fire Ins. Co. v. Stanford*, 28 Ill. 168.

20 See notes 31, 32, and Chaps. VIII, §27, note 42, and Chap. XVIII, §17. *McClure v. People*, 27 Colo. 358, is one of the most fully considered cases of recent date dealing with the criminal aspects of an officer's liability.

21 *State v. Beach*, 147 Ind. 74; *Robertson v. People*, 20 Colo. 279; *McClure v. People*, 27 Colo. 358; *Meadowcroft v. People*, 163 Ill. 56; *Brown v. People*, 173 Ill. 34; *State v. Buck*, 120 Mo. 479; *Baker v. State*, 54 Wis. 368. In Alabama a statute providing that a banker who receives a deposit knowing that he is insolvent is guilty of a misdemeanor is declared to be a violation of the constitutional provision that no person shall be liable for a debt. *Carr v. State*, 106 Ala. 35.

22 *Stout v. Lusk*, 9 Kan. App. 694; *Easton v. Iowa*, 188 U. S. 220, revg. 113 Iowa 516. *State v. Leland*, 91 Minn. 321.

23 *State v. Yetzer*, 97 Iowa, 423; *Carr v. State*, 104 Ala. 4.

24 *Carr v. State*, 104 Ala. 4; *State v. Yetzer*, 97 Iowa, 423; *State v. Eifert*, 102 Iowa, 188; *State v. Cadwell*, 79 Iowa, 432; *State v. Sattley*, 131

actually receive a deposit, knowing their bank is hopelessly insolvent,²⁵ commit the wrongful deed;²⁶ the deposit, if still existing, can be recovered by the depositor;²⁷ and the officers may be punished.²⁸ Furthermore, an insolvent banker who receives deposits from two or more persons on the same day is guilty of two or more distinct offences.²⁹

Can an officer be held who possesses no actual, but only constructive knowledge of the bank's insolvency? In some jurisdictions actual knowledge must be proved,³⁰ in others he is

Mo. 464; *Baker v. State*, 54 Wis. 368. A manager is guilty for receiving a deposit by a clerk contrary to the manager's orders, but retained after an opportunity to return it. *State v. Eifert*, 102 Iowa 188. Nor will a dissolution of a banking partnership relieve the retiring member. *State v. Clements*, 82 Minn. 434.

25 *Commonwealth v. Junkin*, 170 Pa. 194, revg. 16 Pa. Co. Ct. 116; *Williams v. Van Norden Trust Co.*, 104 N. Y. App. Div. 251.

26 *State v. Beach*, 147 Ind. 74; *Am. Trust & Sav. Bank v. Gueder Mfg. Co.*, 150 Ill. 336; *First Nat. Bank v. Strauss*, 66 Miss. 479; *Hyland v. Roe*, 111 Wis. 361; *Richardson v. Denegre*, 35 C. C. A. 452; *Richardson v. N. O. Debenture Redemption Co.*, 42 C. C. A. 619; *Richardson v. N. O. Coffee Co.*, 43 C. C. A. 583. The officers of a bank that is known to be insolvent, though most of its business has been transferred to another bank, are none the less guilty for receiving deposits. *State v. Boomer*, 103 Iowa 106.

27 The deposit is not a bank asset which the receiver can control. The depositor alone can sue for its recovery. *Mallon v. Hyde*, 76 Fed. 388.

28 *State v. Beach*, 147 Ind. 74; *Meadowcroft v. People*, 163 Ill. 56; *Baker v. State*, 54 Wis. 368. If the statute forbids a bank officer "to receive or assent" to the receiving of a deposit knowing of the insolvency of the bank, a conviction cannot be sustained on a charge of receiving a deposit when the evidence offered was only an assent to its reception, which was not proved. *State v. Wells*, 134 Mo. 238. To recover an entire deposit it must appear that the officers and directors knew at the time of receiving the deposit of the bank's insolvency. *Stapleton v. Odell*, 21 N. Y. Misc. 94. The rights of a depositor are not affected by his relationship to the bank as a stockholder. *Richardson v. Olivier*, 44 C. C. A. 468. He has the same right to reclaim a deposit fraudulently received as any other depositor. *Ibid.*

29 *Commonwealth v. Hazlett*, 16 Pa. Super. Ct. 534.

30 See Chap. VIII. §27, note 42. *State v. Dunning*, 107 N. W. (Iowa) 927; *State v. Darrah*, 152 Mo. 522; *Utley v. Hill*, 155 Mo. 232; *State v. Tomblin*, 57 Kan. 841; *Wolfe v. Simmons*, 75 Miss. 539, 541; *State v. Cadwallader*, 154 Ind. 607; *Richardson v. Olivier*, 44 C. C. A. 468; *Quinn*

liable if he ought to have known; in other words, he cannot screen himself behind his ignorance, resulting from neglect of duty.³¹ Wherever the former rule exists, an ordinary director may escape, while an active officer, who knows, must suffer.³² These varying rules are, to some extent, based on the interpretation of dissimilar statutes. The tendency is to hold directors liable when they would have known the condition of their bank had they attended to their duty.³³ And especially

v. Earle, 95 Fed. 728; Perth Amboy Gas Light Co. v. Middlesex Co. Bank, 60 N. J. Eq. 84; Stapleton v. Odell, 21 N. Y. Misc. 94. See McClure v. People, 27 Colo. 358.

31 State v. Quackenbush, 108 N. W. (Minn.) 953; Orme v. Baker, 78 N. E. (Ohio) 439, 444.

32 Cases under note 30.

In the trial of a director, however, he may testify to his belief concerning the responsibility of the bank at the time the deposit was received, although there may be abundant evidence showing that he could not have entertained it. Cassidy v. Uhlmann, 163 N. Y. 380, revg. 27 App. Div. 80; second trial, 101 App. Div. 388; Cassidy v. Uhlmann, 54 App. Div. 205, affd. 170 N. Y. 505. "The relation of a director of a bank to its depositors is a confidential and fiduciary one; and a director who having ascertained by personal investigation that his bank is hopelessly insolvent, participates in keeping the bank open for the receipt of deposits, in effect represents to the public during that period that it is solvent, commits a breach of his legal duty and becomes personally liable to one who during such time makes deposits therein." Cassidy v. Uhlmann, 27 N. Y. App. Div. 80, approved 170 N. Y. 505. See case of Nathan v. Uhlmann, 101 N. Y. App. Div. 388.

33 In Orme v. Baker, 78 N. E. (Ohio) 439, 444, the court declared that a board of directors is chargeable with such knowledge of the insolvency of their bank "as would have been ascertained by the exercise of ordinary care." In Baxter v. Coughlin, 80 Minn. 322, 325, which was an action against directors for receiving a deposit when the bank was insolvent, the court said: "It does not follow that because a person holds the position of director of a bank, he is possessed of full knowledge of all its affairs or the condition of its assets and liabilities. The officers and directors who have immediate and actual charge and conduct of the business of the bank may know, or have good reason to know, that it is insolvent when a director not active in the conduct of such business may not know, and the circumstances may be such as to relieve him of the duty and obligation of knowing. Whether one or all are liable in such cases, therefore, will depend on the state of the evidence in each case as to the knowledge and notice of each on the subject of the insolvency of the bank, and the question is one for the jury."

whenever a statute requires them to make examinations for themselves at reasonable times and they have neglected the requirements.³⁴

Perhaps the greatest difficulty in executing these statutes is in determining the insolvency of the bank within the meaning of the law at the time of receiving the deposit. The general rule may be thus stated: The officers of a bank who receive a check on deposit after it has become insolvent, knowing that failure is impending, violate the law and must answer for the consequences.³⁵

In one of the many cases that might be mentioned the Supreme Court of the United States declared that when a bank has become hopelessly insolvent, which is known by its president, it is a fraud to receive deposits of checks from an innocent depositor, ignorant of its condition, and he can reclaim them or their proceeds.³⁶ In a more recent case the Circuit Court of Appeals said: "A banker who knows that he is hopelessly insolvent cannot honestly continue business and receive money from his customers. He may not intend to defraud a particular customer, but he will be held, of course, to have intended the inevitable consequences of his act—that is, to cheat and defraud all persons whose money he receives and

34 *Forbes v. Mohr*, 76 Pac. (Kan.) 827.

35 Cases under notes 24-26; *St. Louis & San Francisco R. v. Johnston*, 133 U. S. 566; *Stapylton v. Compagnie des Phosphates de France*, 31 C. C. A. 383. As the depositor's action is founded on fraud, an honest but mistaken belief by a banker in the solvency of his bank at the time of receiving the deposit is fatal to the action. *Williams v. Van Norden Trust Co.*, 104 N. Y. App. Div. 251.

In Missouri "the statute makes the fact of insolvency *prima facie* evidence not only that the officer knew it was insolvent, but that he also assented to receiving the deposit." *Eads v. Orcutt*, 79 Mo. App. 511, 523; *Speer v. Burlingame*, 61 Mo. App. 75. It does not follow that a bank is solvent because it may ultimately have a surplus in winding up its affairs. *Chicago Title & Trust Co. v. Household Guest Co.*, 88 Ill. App. 126. Nor that it is insolvent because it temporarily failed to meet its obligations. *Ibid.* To close a bank, refuse to pay deposits, and make an assignment is complete evidence of insolvency. *Commonwealth v. Hazlett*, 16 Pa. Super. Ct. 534. See *Chicago Title & Trust Co.* case, 88 Ill. App. 126.

36 *St. Louis & San Francisco R. v. Johnston*, 133 U. S. 566.

whom he fails to pay before he stops business."³⁷ And the offence is complete when the deposit was received, whether this was before or after a prescribed period of insolvency. The only effect of such a limitation is, if a bank fails within the period prescribed, thirty days or some other, after receiving the deposit, this is regarded as *prima facie* evidence of an intention to defraud, but the act may be committed, though the deposit was received before.³⁸

8. Nature of Act by Bank Irregularly Organized.

The nature of the act is not affected by the irregular organization of one's bank.³⁹ An officer cannot thus shield himself by his own wrong, or that of another officer who has omitted, either intentionally or otherwise, to comply with the law pertaining to the bank's organization. But an officer who should receive deposits while having his bank examined in good faith to find out whether or not it was insolvent would not be guilty of fraud in so doing.⁴⁰

37 *Richardson v. New Orleans Coffee Co.*, 43 C. C. A. 583, 587; *Lake Erie R. v. Indianapolis Nat. Bank*, 65 Fed. 690; *Peck v. First Nat. Bank*, 43 Fed. 357; *Wasson v. Hawkins*, 59 Fed. 233; *Western Nat. Bank v. Norvell*, 134 Fed. 724; *Am. Trust and Sav. Bank v. Gueder Mfg. Co.*, 150 Ill. 336; *Higgins v. Hayden*, 53 Neb. 61; *Perth Amboy Gaslight Co. v. Middlesex Co. Bank*, 60 N. J. Eq. 84; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 559; *Grant v. Walsh*, 145 N. Y. 502; *Cragie v. Hadley*, 99 N. Y. 133; *Metropolitan Nat. Bank v. Lloyd*, 90 N. Y. 530; *Anonymous*, 67 N. Y. 598; *Blair v. Hill*, 50 N. Y. App. Div. 33; *State v. Sattley*, 131 Mo. 464; *Williams v. Cox*, 99 Tenn. 403; *Brunner v. Bank*, 97 Tenn. 540; *Showalter v. Cox*, 97 Tenn. 547; *McClure v. People*, 27 Colo. 358; *Metropolitan Nat. Bank v. Lloyd*, 90 N. Y. 530, and criticism of this case in *Beal v. City of Somerville*, 50 Fed. 647, 651.

38 *Lantermann v. Travous*, 73 Ill. App. 670, *affd.* 174 Ill. 459. Such a rule of evidence is not unconstitutional. *State v. Beach*, 147 Ind. 74. The Illinois statute also applies to civil proceedings. *Am. Trust & Savings Bank v. Gueder Mfg. Co.*, 150 Ill. 336. A bank that is insolvent and receives checks one day before suspension has *prima facie* committed a fraud. *Jernberg v. Mix*, 100 Ill. App. 264; *Am. Trust & Sav. Bank v. Gueder & Paeschke Mfg. Co.*, 150 Ill. 336.

39 *State v. Buck*, 120 Mo. 479; *State v. Stevens*, 16 S. Dak. 310.

40 *Perth Amboy Gas Light Co. v. Middlesex Co. Bank*, 60 N. J. Eq. 84.

9. When Can Deposit, or Substitute, be Recovered.

Notwithstanding the insolvency of a bank at the time of receiving a deposit, its subsequent recovery may not be easy. The law is in a transitory stage; many of the older decisions are no longer in harmony with the newer rules.

(a.) To recover a deposit, on the ground that it ought not to have been received, there must have been an actual deposit as distinguished from the mere crediting of a check to the depositor.⁴¹ But when an actual deposit of money, checks, notes, or other property has been made, and is still in the bank, it can be recovered by replevin or other appropriate action.⁴² This rule is everywhere applied.

(b.) If the deposit has been received and can be traced, or has become mingled with an existing fund, it can be recovered.⁴³ Likewise a portion of the fund that exists or can be

⁴¹ *Kansas State Bank v. First State Bank*, 62 Kan. 788; *Travellers' Ins. Co. v. Caldwell*, 59 Kan. 156; *Middland Nat. Bank v. Brightwell*, 148 Mo. 358; *Perth Amboy Gas Light Co. v. Middlesex Co. Bank*, 60 N. J. Eq. 84; *Sherwood v. Milford State Bank*, 94 Mich. 78; *Quin v. Earle*, 95 Fed. 728, 731. See Chap. XVI. §§10-15.

To receive a deposit in payment of an overdraft therefore is not actionable, for the depositor has nothing to his credit. *Nichols v. State*, 46 Neb. 715.

⁴² *Corn Exchange Nat. Bank v. Solicitors' Loan & Trust Co.*, 188 Pa. 330; *Furber v. Stephens*, 35 Fed. 17; *Cragie v. Hadley*, 99 N. Y. 131; *In re Commercial Bank*, 1 Ohio N. P. 358; *Bruner v. Bank*, 97 Tenn. 540. A deposit payable after a stated period with interest is within the statute against fraudulent banking. *State v. Boomer*, 103 Iowa 106.

⁴³ *National Bank v. Insurance Co.*, 104 U. S. 54; *Thompson v. Perkins*, 3 Mason (U. S.) 232; *St. Louis Brewing Assn. v. Austin*, 100 Ala. 313; *People v. City Bank*, 96 N. Y. 32; *Matter of Holmes*, 37 N. Y. App. Div. 15; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Importers & Traders' Nat. Bank v. Peters*, 123 N. Y. 272; *Peak v. Ellicott*, 30 Kan. 156; *Kansas State Bank v. First State Bank*, 62 Kan. 788, revg. 9 Kan. App. 839; *Harrison v. Smith*, 83 Mo. 210; *Guignon v. First Nat. Bank*, 22 Mont. 140, 145; *State v. Foster*, 7 Wy. 199; *Englar v. Offutt*, 70 Md. 78; *Fletcher v. Sharpe*, 108 Ind. 276; *Pearce v. Dill*, 149 Ind. 136; *Jones v. Chesebrough*, 105 Iowa 303; *State v. Bank of Commerce*, 61 Neb. 181; *State v. Northern Trust Co.*, 70 Minn. 393; *Shute v. Hinman*, 34 Or. 578; *Ferchen v. Arndt*, 26 Or. 121; *McAfee v. Bland*, 11 Ky. L. Rep. 1; *Farmers & Traders' Bank v. Kimball Milling Co.*, 1 S. Dak. 388; *Frank v. Kurtz*, 4 Pa. Super. Ct. 233. See Chap. VI. §9.

In *Roca v. Byrne*, 145 N. Y. 182, 186, the court said: "A principal is en-

traced into another form.⁴⁴ So long as its presence can be detected in the original or a substituted form, existing either separately or as a part of another amount, it can be recovered.⁴⁵

On the other hand, if the deposit has been paid out or mingled with a larger fund from which many payments have been made, and there is no clear evidence that the deposit or any

titled in all cases, where he can trace his property, whether it be in the hands of his agent, or of his representatives, or of third persons, to reclaim it, and it is immaterial that it may have been converted into money; so only that it is in condition to be distinguished from the other property or assets of the agent." "It may be," said Gaines, J., in *Continental Nat. Bank v. Weems*, 69 Tex. 489, 497, "that when the entire mass is once paid away, the right to claim a trust in any money or property is forever lost. But if throughout all the trustee's dealings with the funds so mingled together, he keeps on hand a sufficient sum to cover the amount of the trust money, we think it capable of demonstration, that the trust should attach to the balance that is found to remain in his hands." In *Pearce v. Dill*, 149 Ind. 136, 143, the court said: "When the right to pursue and reclaim a trust fund exists, the true owner thereof, when the fund is traced to the possession of another and identified, has the right to have it restored to him, not as a debt due and owing to him, but for the reason that it is his property, wrongfully diverted and withheld; and it can make no difference in regard to the right of recovery in such a case, whether the fund has been traced into the possession of a single individual, or into the hands of a firm or association composed of many persons, or into the form of a bank account. It can be recovered so long as it can be identified in some form provided it has not gone into the possession of a bona fide purchaser without notice." A deposit checked out by the husband of the depositor without her authority in settlement of illegal transactions (speculations) of which the bank had knowledge can be recovered by her. *Ibid.*

44 *Ibid.*

45 *Standard Oil Co. v. Hawkins*, 20 C. C. A. 468; *Metropolitan Nat. Bank v. Campbell Com. Co.*, 77 Fed. 705; *Myers v. Board of Education*, 51 Kan. 87; *Bishop v. Mahoney*, 70 Minn. 238, 240; *Cavin v. Gleason*, 105 N. Y. 256; *Importers & Traders' Nat. Bank v. Peters*, 123 N. Y. 272; *First Nat. Bank v. Hummel*, 14 Colo. 259; *Windstanley v. Second Nat. Bank*, 13 Ind. App. 544; *Nurse v. Satterlee*, 81 Iowa, 491, 495; *Bradley v. Chesebrough*, 111 Iowa, 126, 136; *Carley v. Graves*, 85 Mich. 483; *Sherwood v. Central Mich. Sav. Bank*, 103 Mich. 109; see *Board of Fire Com'rs. v. Wilkinson*, 119 Mich. 655; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358; *Ill. Trust Co. v. Smith*, 21 Blatch. (U. S.) 275; *Bishop v. Mahoney*, 70 Minn. 238; *Billingsley v. Pollock*, 69 Miss. 759; *In re Lebanon Trust Co.*, 166 Pa. 622; *Commercial & Farmers' Nat. Bank v. Davis*, 115 N. C. 226.

portion still remains in the general fund, a similar amount cannot be recovered therefrom.⁴⁶ To justify such a segregation there must be satisfactory proof that the deposit in controversy is still in the general fund. To trace a deposit into such a fund will not suffice.⁴⁷

This general fund in a bank is constantly changing, and, after the addition of a trust deposit, the same as before. But when payments are made after receiving a trust deposit, the courts presume that the bank parts with its own money first, leaving this as the residuum.⁴⁸ Consequently, any portion of the fund that is left, even though less in amount than the trust deposit, is impressed with this character and can be recovered by the beneficiary.⁴⁹ But, we repeat, none can be recovered without proof of its actual existence.⁵⁰ Many a beneficiary has been unable to recover, not through his failure to prove the existence of a trust, but of a fund that he could rightfully claim as his own.⁵¹

46 *Philadelphia Nat. Bank v. Dowd*, 38 Fed. 172; *Higgins v. Hayden*, 53 Neb. 61; *Slater v. Oriental Mills*, 18 R. I. 352.

47 *Bishop v. Mahoney*, 70 Minn. 238; *In re Seven Corners Bank*, 58 Minn. 5; *Monotuck Silk Co. v. Flanders*, 87 Wis. 237; *Bradley v. Chesebrough*, 111 Iowa 126; *Slater v. Oriental Mills*, 18 R. I. 352; *Board of Fire Comrs. v. Wilkinson*, 119 Mich. 655; *Richardson v. Louisville Banking Co.*, 36 C. C. A. 307; *Blake v. State Sav. Bank*, 12 Wash. 619; *Bruner v. Bank*, 97 Tenn. 540. See *Guignon v. First Nat. Bank*, 22 Mont. 140, 145.

48 *State v. Foster*, 5 Wy. 199; *Continental Nat. Bank v. Weems*, 69 Tex. 489; *City of Lincoln v. Morrison*, 64 Neb. 822; *State v. Bank of Commerce*, 61 Neb. 181; *Burnham v. Barth*, 89 Wis. 362; *Monotuck Silk Co. v. Flanders*, 87 Wis. 237; *Importers & Traders' Nat. Bank v. Peters*, 123 N. Y. 272, 278; *Matter of Holmes*, 37 N. Y. App. Div. 15; *Wetherell v. O'Brien*, 140 Ill. 146; *Woodhouse v. Crandall*, 197 Ill. 104; *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206, revg. 57 Ill. App. 107; *Plano Mfg. Co. v. Auld*, 14 S. Dak. 512; *Bishop v. Mahoney*, 70 Minn. 238; *Board of Fire Comrs. v. Wilkinson*, 119 Mich. 655; *Cole v. Bates*, 186 Mass. 584, 587; *National Bank v. Insurance Co.*, 104 U. S. 54; *Knatchbull v. Hallett*, L. R. 13 Ch. Div. (Eng.) 696.

49 *Ibid.*

50 *Ober v. Cochran*, 118 Ga. 396, contains an able discussion of the subject.

51 Many of the syllabi give a wrong impression of the true reason for denying relief to the applicant; the trust existed, but not the fund.

(d.) Suppose the general fund is reduced by ordinary payments very considerably below the amount of the trust fund, yet at the time of the bank's failure contains an equivalent or even larger sum; as the trust fund to some extent has surely been paid out, the replenished fund has a different composition. On this question the courts again divide, some holding that the trust depositor can recover only the balance of the general fund when it was at the lowest point,⁵² assuming that this balance only was trust money; others holding that the trust depositor can take all there was at the time of the bank's failure,⁵³ if need be, to pay his deposit, because there is nothing wrong in law and morals in thus paying the trust deposit.

No one, we think, will assail the position, that a restored trust fund may be taken by the beneficiary if the addition truly belongs to the restorer.⁵⁴ The rub comes when the restoration is effected by using the resources of another. The trust depositor may indeed have a higher claim against the bank, but to satisfy that claim, under such conditions, by taking the amount from another innocent depositor, is to violate a great principle of equity, that the property of a person in the possession of a bankrupt shall not be taken to pay the debt of another.⁵⁵ As the Supreme Court of Iowa has well said:⁵⁶ "That a person is a trust depositor does not of itself entitle him to preference over general creditors. To obtain that right, he must show by presumption of law or otherwise that his fund has been preserved in the hands of the assignee as an increase of the *assets* of the estate, from which it may be taken without infringement of the rights of general creditors." In permitting a trust depositor to recover his money it must be his, and

52 See *Bishop v. Mahoney*, 70 Minn. 238, 240, and Chap. XVI. §15.

53 *Davenport Flour Co. v. Lamp*, 80 Iowa 722. See remarks on this case in *Jones v. Chesebrough*, 105 Iowa 303, 305.

54 *Jeffray v. Tower*, 63 N. J. Eq. 530; *Baker v. New York Nat. Ex. Bank*, 100 N. Y. 31; *Ex parte Kingston*, 6 Ch. App. (Eng.) 632.

55 *Matter of Franklin Bank*, 1 Paige (N. Y.) 249, 253; *Middland Nat. Bank v. Brightwell*, 148 Mo. 358, 365.

56 *Bradley v. Chesebrough*, 111 Iowa 126, 136.

not the deposit of another. If his money has been paid out by the bank to other depositors on their checks, payable to themselves or to third parties, surely the bank in no sense is any longer the actual possessor; on the other hand, if it were paid to a borrower on a loan, who had not yet parted with it, the depositor's right thereto by that rule would exist.

Legal presumptions have often served as valuable rules in deciding cases, but injustice may be done by an erroneous application of them. When the fact of a trust deposit is not questioned the rule is clearly settled that it can be recovered if it, or its substitute, can be traced into any other form, or remains a part of an existing fund. But another rule must also be kept in sight—a fund belonging to another depositor, or to him in common with trust depositors, cannot be diverted to pay exclusively one class to the manifest loss of the other. Nor must the presumption we have been considering be employed to accomplish this purpose. It is an artificial presumption and should never stand in the way of an inquiry into the facts. If they fail to show what use was made of a trust deposit, the courts should be slow to permit a recovery based solely on this presumption. When a trust deposit has been mingled with another fund and is truly there, it may be reclaimed by the trust depositor, but when its existence rests on a presumption that is probably opposed to fact, or at best on uncertainty respecting the retention or use of a trust deposit, a court may well hesitate to give precedence to the claims of a trust depositor on the slender basis of this presumption.

Three classes of cases at least exist to which this presumption should be dissimilarly applied:

(1) Those in which the bank has no knowledge that the deposit is a trust fund—for example, a deposit made by an agent against his principal's express or implied direction in his own name. Surely, in such a case, the bank would not reserve the deposit in making payments. Suppose five thousand dollars of trust money is mingled with a general fund of the same amount, and that subsequently four thousand dollars is paid out? If the bank at the time of receiving the trust

money or afterwards, previous to its payment, did not know that it was trust money, or did know and never returned it, is not the presumption much stronger than the other that it made this payment indiscriminately from the general fund without the slightest thought of the source whence it came? If so, would not a juster rule apportion this payment equally from the trust money and the other, two thousand dollars from each source, instead of taking it all from the original five thousand dollar fund, still leaving the trust money intact besides a thousand dollars more?

(2) In like manner a bank may receive a trust deposit knowing its true character, but, not regarding the law, mingles it with its general fund and pays it out without caring a whit about its legal obligations. Is not the application of the presumption in this class of cases without a reasonable basis?

(3) A third class of cases may be mentioned to which the presumption may be properly applied, or in which the fact may be shown, that the bank did seek to preserve the trust deposit. But when a bank receives a deposit knowing that it is in an insolvent condition, thus clearly violating the law, is it reasonable to presume that it will make the slightest distinction in the use of its deposits?

This presumption has been made to serve a twofold purpose—to preserve a fund for a trust depositor and to lessen the wrong-doing of the bank officers in the receipt and use of it. The facts in many a case in which this presumption has been applied have shown that the officers were utterly indifferent to the law in the general conduct of their bank; is it not quite illogical, therefore, to maintain that in this particular matter they sought to regard the law in the interest of the true owner of the deposit? The only case in which the presumption ought to be applied is the one in which the bank knew, either at the time of receiving the deposit or afterwards while it was in its possession, its true trust character, and in the keeping and use of it sought to observe the law.

Do not these suggestions, dropped by the wayside of discussion, clearly show that this artificial presumption ought to be

more carefully applied in the determination of the rights of parties in these difficult controversies?

(e.) Checks received just before a bank's failure, in violation of law, must be returned; and if they have been sent away for collection, the proceeds always belong to the depositor, though collected after the bank's failure.⁵⁷ When, however, they have been rightly received before its failure and rightfully credited to the sender by reason of an agreement to treat them in this manner, then the proceeds can usually be kept by the collecting bank.

In some cases the depositor may employ another remedy. If his deposit remains in specie, the contract may be rescinded and the actual property recovered.⁵⁸

(f.) Neither the common nor the statutory law transforms into a preference a general deposit which the depositor intends to withdraw on his written order, but is persuaded by false representations of the bank's officers concerning the solvency of the bank. The real transaction is nothing more than a representation by the debtor to his creditor not to press his claim. Though the creditor succeeds, and by evil means, the nature of the depositor's deposit is not thereby changed endowing him with any special right for its recovery.⁵⁹

57 *Levi v. National Bank*, 5 Dill. 104; *Richardson v. N. O. Coffee Co.*, 43 C. C. A. 583; *In re Havens*, 8 Ben. (U. S.) 309; *Commercial Bank v. Armstrong*, 148 U. S. 50; *Blair v. Hill*, 50 N. Y. App. Div. 33; *First Nat. Bank v. Strauss*, 66 Miss. 479; *Richardson v. Denegre*, 35 C. C. A. 452; *Guignon v. First Nat. Bank*, 22 Mont. 140; *Showalter v. Cox*, 97 Tenn. 547; *American Ex. Nat. Bank v. Loretta Mining Co.*, 165 Ill. 103. See §§24-26 for more cases.

58 *Higgins v. Hayden*, 53 Neb. 61; *Wilson v. Coburn*, 55 Neb. 530; *First Nat. Bank v. Strauss*, 66 Miss. 479; *Assignment of Commercial Bank*, 1 Ohio N. P. 358. A depositor in seeking to recover his deposits may proceed within the discretion of the court on the petition appointing the receiver or in an independent suit. *Blake v. State Sav. Bank*, 12 Wash. 619. Under the Nebraska statute the depositor can also recover interest. *Capitol Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786.

59 *Venner v. Cox*, 35 S. W. (Tenn. Ch. App.) 769. A loaned money to B, giving him a check on a bank which A deposited to his credit. The bank, though insolvent, had money enough to pay the check. Having failed

10. Pleading.

In pleading a complaint alleging that the defendants as directors of an insolvent bank received from the plaintiff a deposit of money knowing the bank to be then insolvent, of which fact he was ignorant, whereby he lost his deposit, states a cause of action.⁶⁰

11. Duration of Officer's Liability.

In seeking to recover the deposits thus wrongfully confided to a bank from its officers, an important question has arisen concerning the duration of their liability for them. If the act of taking them is regarded as a penal offence,⁶¹ the period for their recovery is shorter than if the act is viewed in a milder light.⁶²

12. What Banks and Bankers Are Included by Statute and Common Law.

Lastly, what banks and bankers are included within the operation of the statute and common law against receiving deposits when in an insolvent condition? In New York, merchants and bankers who are thus amenable are those reporting to the bank superintendent.⁶³ Of course, all incorporated banks are included, and very generally private bankers.⁶⁴

before the money was drawn out, A could not recover it of B, nor escape paying his note. *Hubbard v. Petley*, 85 S. W. (Tex. Civ. App.) 509.

60 *Baxter v. Coughlin*, 70 Minn. 1. See *Baxter v. Nash*, *Ibid*, 20.

61 *Eads v. Orcutt*, 79 Mo. App. 511, 523.

62 *Frame v. Ashley*, 59 Kan. 477.

63 *Hall v. Baker*, 66 N. Y. App. Div. 131.

64 *Frey v. Torrey*, 36 N. Y. Misc. 216; *Blair v. Hill*, 50 N. Y. App. Div.

33. In Texas a complaint against a banking partnership must allege the names of the partners. *Roby v. State*, 51 S. W. (Tex. Civ. App.) 1114. A discharge in bankruptcy will not protect him from his debt. *Frey case*, 36 N. Y. Misc. 216; *Ewart v. Schwartz*, 16 Jones & Spencer (N. Y.) 390; *Stokes v. Mason*, 10 R. I. 261.

CHAPTER VII.

AUTHORITY TO MAKE LOANS.

1. Authority is defined by statute.
2. Forms of loans. Drafts and promissory notes.
3. Overdraft.
 - a. May be a proper loan.
 - b. Liability of drawer and application of subsequent deposits.
 - c. Liability of principal or partner on agent's overdraft.
 - d. Interest on overdraft.
 - e. Cashier's authority to make such a loan.
 - f. Security of bank from loss through overdraft.
4. Letter of credit.
 - a. Notice of guaranty.
5. Stock in other corporations.
6. Purchase of its own stock.
7. Stock mortgages.
8. Loan on uncollected checks.
9. Loans on fraudulent representations. Effect on surety's liability.
10. Borrower's warranty of genuineness of paper.
11. To whom loans may be made.
 - a. To agent for principal.
 - b. To executor.
 - c. To technical trustee.
12. When loans may be rescinded.
13. Payment of a loan by crediting borrower's account.
14. Security for present loan. Stock of lending bank. Bills of lading.
15. Individual loan to bank officer with his bank stock as security.
16. Negotiation of security is not affected by illegality of loan.
17. What security may be taken for past debts.
18. What use and disposition may be made of it.
19. Consequences of making illegal loans. *Ultra vires*.
 - a. Improper mode of execution does not invalidate.
 - b. Executory contract will not be enforced.
 - c. Executed contract is left by the courts to the parties.
 - d. If executed on one side courts deal with it in one of three ways.
 - d1. The contract is disregarded and the money paid is recovered on implied contract.
 - d2. Justice is rendered regardless of the contract.
 - d3. Courts will not allow this defence to be interposed.
 - d4. Federal view.
 - d5. Legal note purchased without authority can be enforced.

- | | |
|---|--|
| <ul style="list-style-type: none"> e. Effect of ultra vires acts between bank and creditors. f. Contract is presumed to be based on adequate authority. 20. Authority to transfer paper. Re-discounting. 21. Authority to lend for another. <ul style="list-style-type: none"> a. Care required in accepting collateral. 22. Authority of bank to borrow. 23. Restrictions on bank's authority to lend its money. 24. Bank may collect money it ought not to have loaned. 25. Bank cannot lend its credit. 26. Bank's responsibility for collaterals. <ul style="list-style-type: none"> a. Must keep them safely. b. Cannot transfer them before maturity. c. How long pledgee can retain them. | <ul style="list-style-type: none"> d. Care it must exercise in collecting. e. Pledgor's right to re-pledge. 27. Bank's duty to collect collaterals. <ul style="list-style-type: none"> a. Cannot sell them to itself. b. Proceeds and dividends. c. Sale of commercial paper. d. Sale before maturity of loan. 28. Loans to corporation. 29. Loans to partnership. 30. Loans by savings bank. 31. Loans by stockholders to their bank. 32. Defences to loans. 33. Renewals. 34. Paper left for discount and refused. 35. Damage on promised, but not executed loan. 36. Interest. 37. Loans by foreign bank. |
|---|--|

1. Authority is Defined by Statute.

Authority to lend is defined by statute, and many of the questions relating to loans are statutory interpretations.¹ A bank can lend its general deposits,² and, unless there be a positive inhibition, can take real estate security.³ Again, a bank possessing authority to lend on the security of public stocks,⁴ bond and mortgage, can discount commercial paper.⁵ In exercising this authority, the legal presumption is that the bank was duly incorporated.⁶

¹ See Chap. IX, §20.

² *Foster v. Essex Bank*, 17 Mass. 479, 505.

³ *Bank v. Hemme Orchard & Land Co.*, 105 Cal. 376.

⁴ A national bank cannot lend on bonds except those issued by the government. See Ch. I, §25a. Sometimes a limitation is imposed on the length of loans. *Dockery v. Miller*, 9 Humph. (Tenn.) 371. An agreement that one-sixth of a loan is to remain in deposit is illegal. *Western Bank v. Mills*, 7 Cush. (Mass.) 539; *Mills v. Rice*, 6 Gray (Mass.) 458.

⁵ *Detroit Sav. Bank v. Truesdail*, 38 Mich. 430; *State Bank v. Criswell*, 15 Ark. 230.

⁶ *Yungfleisch's Appeal*, 1 Walk. (Pa.) 125.

2. Forms of Loans. Drafts and Promissory Notes.

Loans may assume various forms; the most common are promissory notes and bills of exchange. Formerly, when usury laws were more rigidly enforced, the distinction between loans and purchases was important; because a loan might be tainted with usury and under legal condemnation that would not be, if it truly was a purchase.⁷ In discounting a note, the compensation for the service was fixed by law; in purchasing a note, a bank could pay what it pleased.⁸ To prevent banks from violating the usury laws under the guise of purchases, they were sometimes forbidden from purchasing bills of exchange and other instruments.⁹ In interpreting the national banking law,¹⁰ as well as the banking laws of some of the states,¹¹ the distinction between authority to lend by purchase and by discount is no longer recognized.

7 *Farmers' & Mech. Bank v. Baldwin*, 23 Minn. 198; *First Nat. Bank v. Pierson*, 24 Minn. 140, changed by Gen. Stat. 1866, Ch. 33, §15; *Niagara Co. Bank v. Baker*, 15 Ohio St. 68; *Ridgway v. National Bank*, 12 Ky. L. Rep. 216. See *Fleckner v. Bank*, 8 Wheat. (U. S.) 338. Money loaned by a bank at a usurious rate of interest for which a note is given, including the interest, payable at a future day, is not a discount. *Planters' & Merch. Bank v. Goetter*, 108 Ala. 408. Nor is a note taken for a pre-existing debt. *Lime Rock Bank v. Hewett*, 52 Me. 531. 8 *Ibid*.

9 *American Life Ins. & Trust Co. v. Dobbin*, Lalor Supp. (N. Y.) 252, 256; *Niagara Co. Bank v. Baker*, 15 Ohio St. 68. See cases in note 1, and *Nicholson v. National Bank*, 92 Ky. 251. In New York a selling bank that took a time draft in payment made by the purchasing bank did not lend or discount in violation of a statute. (Laws, 1839, Ch. 255, §3.) Though the draft was illegal (See Laws, 1850, Ch. 251) the seller could surrender it and recover on an implied assumpsit the value of the bill measured by the agreed discount. *Buffalo City Bank v. Codd*, 25 N. Y. 163. A bank has prima facie authority to purchase bills of exchange. *Bank v. Ellery*, 34 Barb. (N. Y.) 630.

10 *Danforth v. National State Bank*, 1 C. C. A. 62; *Morris v. Third Nat. Bank*, 142 Fed. 25; *Smith v. Exchange Bank*, 26 Ohio St. 141; *First Nat. Bank v. Sherburne*, 14 Ill. App. 566; *Pape v. Capital Bank*, 20 Kan. 440; *Atlas Nat. Bank v. Savery*, 127 Mass. 75; *Prescott Nat. Bank v. Butler*, 157 Mass. 548; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40; *Atlantic State Bank v. Savery*, 82 N. Y. 291, affg. 18 Hun (N. Y.) 36; *Union Nat. Bank v. Rowan*, 23 S. C. 339. See *Lazear v. National Union Bank*, 52 Md. 78, and *Nicholson v. National Bank*, 92 Ky. 251.

11 *Bank v. Norton*, 3 A. K. Marsh. (Ky.) 422; *Salmon Falls Bank v.*

As the endorsement of a note offered by the maker is presumed to be for accommodation, the bank is governed by the peculiar principle that applies to the authority of a partner to endorse such paper whenever the endorsement is by a partnership. The bank, at its peril, must ascertain whether the partner thus endorsing had the needful authority.¹²

3. Overdraft.

(a.) An overdraft is another form of lending,¹³ and is proved by the drawing and payment of a check without any funds to the drawer's credit.¹⁴ Once, overdrawing was strongly, indiscriminately condemned;¹⁵ even now in some states such a loan cannot be made by the managing officers without special authority from the directors.¹⁶ But this is no longer the common rule. Generally two kinds of overdrafts are as clearly justified as any other kind of loan. First, an unintentional overdraft by a depositor in good standing and possessing ample means to pay.¹⁷ Second, an overdraft to be paid in pur-

Leyser, 116 Mo. 51; Neilsville Bank v. Tuthill, 4 Dak. 295. See Black v. First Nat. Bank, 96 Md. 399. The purchase by a bank of notes at two per cent. discount below the legal rate of six per cent. is not a sufficient departure to warrant the inference of bad faith. Second Nat. Bank v. Weston, 172 N. Y. 250.

12 Lemoine v. Bank, 3 Dill. (U. S.) 44; Bank v. Bowen, 7 Wend. (N. Y.) 158; Gansevoort v. Williams, 14 Wend. 133; Stall v. Catskill Bank, 18 Wend. 466, 478; Hendrie v. Berkowitz, 37 Cal. 113.

13 See Chap. XX, §27. Exchange charged by a bank against a shipper of stock to whom it was advancing money by agreement is an overdraft. Low v. Taylor, 41 Mo. 517.

14 Marine Bank v. Butler Colliery Co., 125 N. Y. 695.

15 Eichelberger v. Finley, 7 Har. & J. (Md.) 381, 387; Lancaster Bank v. Woodward, 18 Pa. 357; Bank v. Calder, 3 Strobb. (S. C.) 403, 408; Minor v. Mechanics' Bank, 1 Pet. (U. S.) 46; State v. Stimson, 24 N. J. Law 478; Market Street Bank v. Stumpe, 2 Mo. App. 545. See Union Sav. Association v. Edwards, 47 Mo. 445.

16 Dowd v. Stephenson, 10 S. E. (N. C.) 1101; Oakland Bank v. Wilcox, 60 Cal. 126, 140. See Hier v. Miller, 75 Pac. (Kan.) 77, 78. In New York a bank officer or employee who knowingly overdraws his account commits a penal offence. Laws, 1905, Vol. 1. Ch. 248.

17 Union Mining Co. v. Rocky Mt. Nat. Bank, 96 U. S. 640; Commercial Bank v. Ten Eyck, 48 N. Y. 305; People v. Clements, 42 Hun (N. Y.)

suance of a prior agreement and resting on abundant credit.¹⁸ Though this form of lending may be abused, so may every other; this, therefore, is no condemnation of the method, so long as a bank acts with a reasonable degree of prudence.¹⁹ A depositor's order always implies a promise to repay the bank, whatever may be the condition of his account.²⁰

(b.) As the drawer receives value from the bank, he is clearly liable,²¹ and a notification not to pay overdrafts beyond a prescribed amount is not effective if he continues to draw for more.²² Moreover, money fraudulently obtained on an overdraft may be followed and reclaimed from any one who has not taken it in good faith.²³ Again, any deposit subsequently received from the debtor may be applied in payment;²⁴ for there is a strong presumption that he intends to have it

286, 290; *Jones v. Johnson*, 86 Ky. 530; *Franklin Bank v. Byram*, 39 Me. 489; *Frankenberg v. First Nat. Bank*, 33 Mich. 46; *City Nat. Bank v. Burns*, 68 Ala. 267, 278; *First Nat. Bank v. Reese*, 25 Ky. L. Rep. 778; *Pryse v. Farmers' Bank*, 17 Ky. L. Rep. 1057; *Cope v. Westbay*, 87 S. W. (Mo.) 504; *Queen v. Hazleton*, L. R. 2 Crown Cas. Res. (Eng.) 134.

18 *Ibid.*

19 *Western Bank v. Coldewey*, 83 S. W. (Ky.) 629. Though a drawer's account is overdrawn at the time of making his check, if the cashier has promised to pay it, the holder is not excused for not presenting it for payment, and his neglect will relieve the drawer. *Hamlin v. Simpson*, 105 Iowa 125.

20 *Thomas v. International Bank*, 46 Ill. App. 461.

21 *McLean Co. Bank v. Mitchell*, 88 Ill. 52; *Thomas v. International Bank*, 46 Ill. App. 461; *Franklin Bank v. Byram*, 39 Me. 489; *Frankenberg v. First Nat. Bank*, 33 Mich. 46; *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407.

22 *Bremer Co. Bank v. Mores*, 73 Iowa 289.

23 *Tradesman's Bank v. Merritt*, 1 Paige (N. Y.) 302.

24 *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407; *American Ex. Nat. Bank v. Theummler*, 195 Ill. 90. *Drake v. Sherman*, 179 Ill. 362. See *Van Buren Co. Sav. Bank v. Stirling Woolen Mills Co.*, 125 Iowa 645. Money deposited by one to the credit of himself as deputy treasurer cannot be applied by the bank to pay an overdraft by another as county treasurer. *Citizens' Nat. Bank v. Alexander*, 120 Pa. 476. And if a bank holds two special funds belonging to a state, and one of them is overdrawn, the deficiency cannot be made good from the other. *Bank v. Macalester*, 9 Pa. 475. The balance due at the close of an overdrawn account is an indebtedness created as of the date of the last item on the account, and not as of the

thus applied.²⁵ Of course a bank can always refuse to pay such an order unless it has agreed with the drawer in advance to honor the same.²⁶

(c.) A principal, whose account is overdrawn by an agent with his principal's knowledge, who receives the benefit of the bank's action, is liable;²⁷ likewise a partnership whose account is overdrawn by a member, which receives the benefit of his act.²⁸

(d.) The right to charge interest on an overdraft, unless by agreement, has not always been maintained.²⁹ The claim has generally been sustained;³⁰ and we perceive no reason why it should not be, save in cases of granting an overdraft clearly within legal condemnation.

(e.) Whether an officer who is entrusted with large authority to make loans can make one of this character has been questioned,³¹ and decided in his favor.³² The limitation is always implied that in doing so he is acting in good faith, and

date of the original overdraft, for the reason that payments made on a running account, unless specifically appropriated, must be applied in discharge of the oldest debit on the account. *Grant Co. Deposit Bank v. Points*, 56 S. W. (Ky.) 662.

25 *Nichols v. State*, 46 Neb. 715; *Hansen v. Kirtley*, 11 Iowa 565. See *London & San Francisco Bank v. Parrott*, 125 Cal. 472.

26 *American Nat. Ex. Bank v. Gregg*, 138 Ill. 596; *First Nat. Bank v. Pettit*, 41 Ill. 492; *Henderson v. United States Nat. Bank*, 59 Neb. 280, and cases cited.

27 *Union Mining Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 248, *affd.* 96 U. S. 640. A depositor who authorizes his bank to honor checks drawn by his agent and general manager is liable also for overdrafts drawn with the depositor's consent. *Wheatley v. Kutz*, 19 Ind. App. 293. See Chap. XIII, §6.

28 *Valz v. First Nat. Bank*, 96 Ky. 543.

29 *Owens v. Stapp*, 32 Ill. App. 653; *Hubbard v. Charlestown R.*, 11 Met. (Mass.) 124.

30 *Casey v. Carver*, 42 Ill. 225; *Union Bank v. Sollee*, 2 Strob. (S. C.) 390; *Loan & Ex. Bank v. Miller*, 39 S. C. 175; *London & San Francisco Bank v. Parrott*, 125 Cal. 472, 490.

31 *Western Bank v. Coldewey*, 83 S. W. (Ky.) 629, 630.

32 *First Nat. Bank v. Reese*, 25 Ky. L. Rep. 778; *Pryse v. Farmers' Bank*, 17 Ky. L. Rep. 1057; *Western Bank v. Coldewey*, 83 S. W. (Ky.) 629.

not with some ulterior purpose opposed to that of the bank.³³ He cannot, therefore, make such a loan to himself by entering the amount as a credit on the pass-book of a depositor to whom he is indebted, and then permit him to check out his deposit as if there had been no tampering with his account.³⁴

(f.) A contract to secure a bank from any loss through an overdraft, or on checks or drafts, unless the language clearly indicates a broader intention, includes only future transactions.³⁵

4. Letter of Credit.

Another form of loan is a letter of credit or guaranty. On this a bank can ordinarily recover for all advances made in execution of its terms.³⁶ The duration of the guaranty is sometimes fixed, sometimes it is left indefinite.³⁷ If there is no limit in time, the advancing bank is protected until receiving adequate notice to the contrary.³⁸

33 See *Breese v. United States*, 106 Fed. 680; *Oakland Bank v. Wilcox*, 60 Cal. 126.

34 *Hier v. Miller*, 75 Pac. (Kan.) 77. The bank can recover the amount of the overdraft from the depositor. *Ibid.*

35 *Drake v. Sherman*, 179 Ill. 362. A note given to secure the amount of an overdraft contemplated continuing transactions with the bank. It secured whatever overdraft existed at its maturity not exceeding the amount and interest. An overdraft thus secured is a single concrete obligation. *County Bank v. Greenberg*, 127 Cal. 26.

36 *Bank of British North America v. Cooper*, 137 U. S. 473; *Bank of Montreal v. Recknagel*, 109 N. Y. 482; *Lafargue v. Harrison*, 70 Cal. 380; *Omaha Nat. Bank v. First Nat. Bank*, 59 Ill. 428. In the latter case one of the checks was not endorsed on the letter, but was paid by the drawee. The drawer's credit was reduced by this amount. See §16.

37 *Bank v. Turney*, 52 S. W. (Tenn. Ch. App.) 762.

38 *White's Bank v. Myles*, 73 N. Y. 335. A bank that has issued a letter to another bank announcing a credit for a stated sum for the use of the holder of the letter, cannot, after learning of the insolvency of the bank to which the letter is directed, retain the funds for a debt due therefrom. *Cutler v. American Ex. Nat. Bank*, 113 N. Y. 593. A deposit of money to purchase a letter of credit is not a trust fund for the benefit of other bankers honoring drafts drawn against the letter, entitling them to priority over other creditors in the event of the failure of the issuing bank. *Kuehne v. Union Trust Co.*, 133 Mich. 133. A bank that is author-

It is not an infrequent thing for an individual to guarantee the credit of an individual with a bank for a specified amount. A bank that issues a letter of credit, obligating itself to pay to a stipulated amount checks that are to be indorsed on the letter, cannot apply other checks drawn by the bearer and cashed by another bank having no knowledge of the letter, in extinguishment of its credit.³⁹

In no case does a special letter of credit pass to the bank's successor.⁴⁰ When such a guaranty is given and the guarantor also gives a note to cover the overdraft of A, the person guaranteed, there is no duty on the part of the bank to apply A's deposits in payment of the guarantor's note.⁴¹

A bank may also agree to pay checks on orders to a specified amount and to a limited time on receiving a bond of indemnity. Such advances are a loan and there is nothing peculiar about the agreement.⁴² But in many states, a third party, who was not privy to the agreement and consideration, may en-

ized to draw drafts against specific merchandise cannot hold the property conveying this authority also. *Bank of Montreal v. Recknagel*, 109 N. Y. 482. A national bank cannot give a letter of credit to another. *Thilmany v. Iowa Nat. Bank*, 108 Iowa 333. A bank that obligates itself by a letter of credit to pay checks to the amount of \$1,000, indorsed on the back of the letter, is not liable to a bank cashing checks not thus indorsed, as against another bank afterward cashing them in compliance with the letter. *Bank of Seneca v. First Nat. Bank*, 105 Mo. App. 722.

39 *Bank of Seneca v. First Nat. Bank*, 105 Mo. App. 722. Concerning the authority of a bank to give a guaranty, see §25.

40 *Lyon v. Van Raden*, 126 Mich. 259. A letter of credit authorizing A to draw upon A, B and C, or either of them, to the amount of \$25,000 in such amounts and on such times as he may require, and jointly and severally holding themselves accountable for the payment and acceptance of such drafts is a standing or continuing guaranty for that amount and is not answered simply by accepting and paying drafts to that amount. Again, A's authority to draw on either of them is revoked by his death, though unknown to A and the period for which authority had been given has not expired. *Michigan State Bank v. Pecks*, 28 Vt. 200; *Michigan State Bank v. Leavenworth*, 28 Vt. 209.

41 *Bank v. Turney*, 52 S. W. (Tenn. Ch. App.) 762, containing many cases on the question of applying deposits to release a surety on a note.

42 *Anthony v. Herman*, 14 Kan. 494; *Bank v. Cramer*, 7 Kan. App. 461; *Chanute Nat. Bank v. Crowell*, 6 Kan. App. 533.

force the bank's promise made for his benefit.⁴³ This innovation on one of the fundamental rules has been considered elsewhere.⁴⁴

(a.) One of the most difficult questions pertaining to a guaranty is, whether notice of it must be given to bind the guarantor.⁴⁵ Nothing is more fundamental than that there must be a meeting of minds to complete a contract; to this rule the contract of guaranty is no exception. When, therefore, the courts have declared that no notice of an absolute guaranty is required, does not the case assume, or the facts show, that the guarantor acted on an offer or proposition proceeding from another party? That his guaranty, though in the form of an offer, was in truth his response to a proposition coming from the other side? On the other hand, when the guaranty is conditional, then it is merely an offer, and an acceptance is needful. Justice Gray has clearly expressed the distinction: "If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract."⁴⁶ The real question therefore is, whether a guaranty exists, or only an

43 *Beeson v. Green*, 103 Iowa 406; *Runkle v. Kettering*, 127 Iowa 6; *Gilbert Paper Co. v. Whiting Paper Co.*, 123 Wis. 472; *Hind v. Holdship*, 2 Watts (Pa.) 104. See elaborate note reviewing many cases in 71 Am. St. Rep. 176-207.

44 See Chaps. XXIII, §17, and XXVII, §2.

45 See *German Sav. Bank v. Drake Roofing Co.*, 112 Iowa 184, for an able discussion of this question and the citation of many cases.

46 *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524.

offer to guarantee, for, in the former case, as the contract is complete, nothing further is required; if only an offer exists, acceptance is as needful as to any other offer.

5. Stock in Other Corporations.

Another form of loan is stock issued by other corporations. Though forbidden by the general government⁴⁷ and by some of the states,⁴⁸ it has the sanction of others.⁴⁹ A bank that can legally be a stockholder in another bank or other corporation, or that can take stock therein to secure a past debt, assumes the same liability as any other stockholder.⁵⁰

On a purchase that is illegal and has not been completed, no action can be sustained to enforce the contract,⁵¹ but on a contract that has been fully executed the purchasing bank is entitled to dividends on the stock.⁵² Again, it can sell the stock thus acquired,⁵³ but a national bank cannot be assessed there-

47 *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364; *California Bank v. Kennedy*, 167 U. S. 362; *First Nat. Bank v. National Ex. Bank*, 92 U. S. 122. See *Weckler v. First Nat. Bank*, 42 Md. 581. An agreement between the officers of a national bank, and the maker of a note that it may be paid by the transfer of the stock of another bank is illegal. *Tillinghast v. Carr*, 82 Fed. 288. And the receiver is not estopped from denying the validity of the agreement by reason of having realized on securities transferred to the bank as a part of the transaction. *Ibid.* See Chap. I, §25.

48 *Nassau Bank v. Jones*, 95 N. Y. 115; *Holmes & Griggs Mfg. Co. v. Holmes Metal Co.*, 127 N. Y. 252, 257; *Mechanics' Sav. Bank v. Meriden Agency Co.*, 24 Conn. 159; *Hill v. Nisbet*, 100 Ind. 341; *Franklin Co. v. Lewiston Institution*, 68 Me. 43; *Bank v. Hart*, 37 Neb. 197; *Schofield v. Goodrich Bros. Banking Co.*, 39 C. C. A. 76; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350; *Morgan v. Lewis*, 46 Ohio St. 1, 6; *Knowles v. Sandercock*, 107 Cal. 629, 642 and cases cited. See Chap. I, §25a.

49 *Goddin v. Crump*, 8 Leigh (Va.) 120; *Hartridge v. Rockwell*, R. M. Charlton (Ga.) 260; *Robison v. Beall*, 26 Ga. 17.

50 *California Bank v. Kennedy*, 167 U. S. 362.

51 *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350.

52 *Bigbee River Packet Co. v. Moore*, 121 Ala. 379. The defence of ultra vires cannot be made against a bank for purchasing stock of another bank that has been fully executed by the purchaser. *City of Goodland v. Bank of Darlington*, 74 Mo. App. 365.

53 *Holmes & Griggs Mfg. Co. v. Holmes Metal Co.*, 127 N. Y. 252.

for.⁵⁴ The inhibition, however, does not prevent a bank from taking stock issued by another corporation in the way of payment for a debt in order to escape loss.⁵⁵

6. Purchase of Its Own Stock.

National banks are forbidden from purchasing their own stock,⁵⁶ and so are some of the state banks,⁵⁷ except to secure a past debt.⁵⁸ In most states the opposite rule now prevails with proper limitations. If the purchase was fair and in good faith, free from fraud, actual or constructive, if the bank was not insolvent or in process of dissolution, and the rights of creditors were in no way affected, the purchase may be upheld.⁵⁹ Whenever a purchase is permitted, the bank can resell to a stockholder or director.⁶⁰

54 *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364; *Scofield v. Goodrich Bros. Bkg. Co.*, 39 C. C. A. 76.

55 *Knowles v. Sandercock*, 107 Cal. 629, 643; *Hill v. Shilling*, 95 N. W. (Neb.) 24. See §17.

56 Rev. Stat. §5201; *Meyers v. Valley Nat. Bank*, 18 Nat. Bank. Reg. 34; *Burrows v. Niblack*, 53 U. S. App. 712. See §17 and Chap. IV. §8.

57 *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *Maryland Trust Co. v. National Mech. Bank*, 63 At. (Md.) 70; *Coppin v. Greenlees*, 38 Ohio St. 275; *Crandall v. Lincoln*, 52 Conn. 73; *Trevor v. Whitworth*, 12 App. Cas. (Eng.) 409; *Hope v. International Financial Society*, 4 Ch. Div. (Eng.) 327; *Gillet v. Moody*, 3 N. Y. 479; *City Bank v. Bruce*, 17 N. Y. 507. See *Leavitt v. Blatchford*, 17 N. Y. 521 and *St. Paul & Minneapolis Trust Co. v. Jenks*, 57 Minn. 248. The defence will not avail when the bank has taken its own stock as security for a discount that it has not sold, nor charged the stock with the amount of the loan. *Butterworth v. Kennedy*, 5 Bos. (N. Y.) 143. A statute declaring, that a bank shall not make a loan or discount on the pledge of its own stock, means directly to the owner, and does not forbid a discount to a third party who has no interest in the stock. *Vansands v. Middlesex Co. Bank*, 26 Conn. 144. A bank that cannot lend on the security of its stock or be the purchaser, except to secure a past debt, cannot collect the note. *St. Paul & Minneapolis Trust Co. v. Jenks*, 57 Minn. 248. A bank undertook, contrary to law, to buy its own stock. A bank that furnished the money understood the illegal character of the transaction. It could not recover the loan. *Maryland Trust Co. v. National Mech. Bank*, 63 At. (Md.) 70. This case draws an unusually clear distinction between illegal and ultra vires acts.

58 See §17. In North Dakota a state bank can take real estate as se-

7. Stock Mortgages.

In Louisiana banks have authority to take mortgages on the land of their shareholders to secure the payment of their stock.⁶¹ These have precedence over other mortgages, though both are made simultaneously.⁶²

8. Loan on Uncollected Checks.

It is a common practice for depositors to deposit checks, for which they are given credit, and to draw against the amount before the bank has completed the collection.⁶³ By thus drawing in advance depositors obtain the bank's money without paying anything therefor. The ownership of such checks has on many occasions troubled the judicial mind. The courts have always been unanimous in holding that the title to checks deposited by, and credited to a depositor who is a contemporaneous debtor, passes at once to the bank absolutely.⁶⁴ Likewise, after an advance has been actually made thereon, the bank becomes the absolute owner.⁶⁵ The rule is no less clear

curity for past or future indebtedness. Rev. Code, 1899, §3230; Merchants' State Bank v. Tufts, 103 N. W. (N. Dak.) 760.

59 City Bank v. Bruce, 17 N. Y. 507; Fremont Carriage Mfg. Co. v. Thomsen, 65 Neb. 370, and cases cited; Porter v. Plymouth Gold Mining Co., 29 Mont. 347, citing many cases; Hartridge v. Rockwell, R. M. Charlton (Ga.) 260; Robison v. Beall, 26 Ga. 17; Farmers' & Merch. Bank v. Champlain Transp. Co., 18 Vt. 131; Dupee v. Boston Water Power Co., 114 Mass. 37; Chicago & Southwestern R. v. Town of Marseilles, 84 Ill. 145.

60 Hartridge v. Rockwell, R. M. Charlton (Ga.) 260. In such a case it can sell on credit and take the stock as collateral security. Union Nat. Bank v. Hunt, 7 Mo. App. 42.

61 Citizens' Bank v. Nicolas, 3 La. Ann. 112.

62 Haynes v. Courtney, 15 La. Ann. 630.

63 See Chap. XVII, §§16, 22. Balbach v. Frelinghuysen, 15 Fed. 675; Titus v. Mechanics' Nat. Bank, 35 N. J. Law 588, 592.

64 Balbach v. Frelinghuysen, 15 Fed. 675, 682; Titus v. Mechanics' Nat. Bank, 35 N. J. Law 588, 592.

65 People v. St. Nicholas Bank, 77 Hun (N. Y.) 159; Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530. See remarks thereon in the Beal case, 1 C. C. A. 598; Scott v. Ocean Bank, 23 N. Y. 289; Taft v. Quinsigamond Nat. Bank, 172 Mass. 363; Carr v. National Security Bank, 107 Mass. 45; Aebi v. Bank of Evansville, 124 Wis. 73; Armstrong v. National Bank, 90 Ky. 431.

that the depositor of a check credited as a check, and not as cash, retains his ownership;⁶⁶ as well as the owner of a check credited provisionally in anticipation of payment, but having no right to draw against the sum credited.⁶⁷ On the other hand, he parts with his ownership whenever by agreement or custom the crediting is to have that effect.⁶⁸ Also when no definite arrangement exists, and the practice is understood of crediting checks as cash with the right to draw immediately against them, their ownership passes to the bank contemporaneously with making the proper endorsement by the depositor and the act of crediting by the receiver.⁶⁹ This clearly is the federal rule.⁷⁰ A request, therefore, by the depositor for the return of a check thus credited, which is honored, must be regarded as a favor and not as a right. On the other hand, the bank clearly parts with no consideration for such checks until

66 *Bailie v. Augusta Sav. Bank*, 95 Ga. 277, 280.

67 *Midland Nat. Bank v. Brightwell*, 148 Mo. 358; *Freeholders of Middlesex Co. v. State Bank*, 32 N. J. Eq. 467, 468; *Hazlett v. Commercial Nat. Bank*, 132 Pa. 118; *Rapp v. National Security Bank*, 136 Pa. 426; *National Butchers' & Drov. Bank v. Hubbell*, 117 N. Y. 384, 394, 395; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553; *Levi v. National Bank*, 5 Dill (U. S.) 104, 111; *First Nat. Bank of Trinidad v. First Nat. Bank of Denver*, 4 Dill. 290; *Balbach v. Frelinghuysen*, 15 Fed. 675; *Beal v. City of Sommerville*, 1 C. C. A. 598.

68 *German Nat. Bank v. Grinsted*, 21 Ky. L. Rep. 674; *Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank*, 38 C. C. A. 108; *Armstrong v. American Ex. Nat. Bank*, 133 U. S. 433; *Brooks v. Bigelow*, 142 Mass. 6; *Midland Nat. Bank v. Roll*, 60 Mo. App. 585, 588; *Clark v. Merchants' Bank*, 2 N. Y. 380, revg. 1 Sandf. 498. In some of the cases the depositor by agreement was to retain his ownership notwithstanding the crediting. *Bury v. Woods*, 17 Mo. App. 245.

69 *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530, affg. 25 Hun 101; *Taft v. Quinsigamond Nat. Bank*, 172 Mass. 363; *Cragie v. Hadley*, 99 N. Y. 131; *Canal Bank v. Hughes*, 17 Wend. (N. Y.) 94; *Noble v. Doughten*, 83 Pac. (Kan.) 1048; *Armstrong v. National Bank*, 90 Ky. 431; *Titus v. Mechanics' Nat. Bank*, 35 N. J. Law 588, 592; *Ayres v. Farmers' & Mech. Bank*, 79 Mo. 421, 424; *Flannery v. Coates*, 80 Mo. 444; *Hoffman v. First Nat. Bank*, 46 N. J. Law 604, 607.

70 *Burton v. United States*, 199 U. S. 283, 302, citing *Thompson v. Riggs*, 5 Wall. (U. S.) 663; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Scammon v. Kimball*, 92 U. S. 362, 369; *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 288.

the depositor draws against them, unless the right to draw is regarded as equivalent to a consideration. Furthermore, some states that maintain this doctrine also hold that a bank which discounts a note by crediting the borrower with the amount is not a bona fide holder until he actually draws the money.⁷¹ Why should not the same principle be applied to a check?

Again, what is the nature and duration of the agreement or understanding to credit checks as cash and permit the depositor to draw instantly for the amount credited? It will be seen that this is a very peculiar mode of lending; and it is proper, nay necessary, that the bank should reserve the right to terminate the agreement promptly. And, in truth, we think it is well understood that a bank may revoke the privilege without consulting the depositor. Advances are made on such checks largely on his credit, as the bank knows but little about the ability of the makers. A bank learns that the depositor's credit is declining; it fears to continue its advances. Ordinary prudence requires the bank to discontinue the practice; it would be a most hazardous mode of lending if a bank were helpless and could not stop; in short, such a practice would be contrary to fundamental law. It may be that a depositor would have a cause of action against a bank that

⁷¹ Mann v. Second Nat. Bank, 30 Kan. 412; Fox v. Bank, 30 Kan. 441; Dreilling v. First Nat. Bank, 43 Kan. 197; First Nat. Bank v. Mt. Pleasant Milling Co., 103 Iowa 518; City Deposit Bank Co. v. Green, 103 N. W. (Iowa) 96; second trial, 106 N. W. 942; Manufacturers' Nat. Bank v. Newell, 71 Wis. 309; Drovers' Nat. Bank v. Blue, 110 Mich. 31. See Central Nat. Bank v. Valentine, 18 Hun (N. Y.) 417, also §13 and Chap. XXIII, §17.

In Ditch v. Western Nat. Bank, 79 Md. 192, 204, a check was endorsed "for deposit to the credit of" the plaintiff, and deposited with a private banker, who endorsed the check similarly and deposited it with the defendant. The court said: "It is extremely difficult to see on what principle or by what process Ditch could retain any interest in this check after he had delivered it to a blank endorsee and had received full and valuable consideration for it. It will not be alleged by any one that the banker did not give a consideration, valuable in the eye of the law, and sufficient to maintain the transfer of the check, when he made an absolute and unconditional contract with the depositor to pay his checks to the amount of the deposit." Tyson v. Western Nat. Bank, 77 Md. 412.

should refuse to pay an outstanding check given on the strength of such credit, but he certainly would have no cause of complaint should his bank refuse to pay a check given after receiving notice of the withdrawal of its credit. Furthermore, as such an agreement affects only the immediate parties, others have no claim against the bank by any change or withdrawal of it, except those living in a state where a contract for the benefit of a third party can be enforced.⁷²

The bank's ownership to checks is affected, so many courts have adjudged, by the bank's right to charge them back in the event of their non-collection. Such a disposition of them is regarded as inconsistent with the right of ownership. This is not the prevailing view.⁷³ Individuals are given checks every day in payment of debts, and if they are not paid the right to return them is never questioned. Ordinarily a person can sue the maker on his check, or return it and sue on the original debt. While in his possession he can hold it as his absolute property, unaffected by his right to return it if unpaid. A bank that has taken a check and given the depositor credit for the amount can, in like manner, charge the amount back and return the check if it is unpaid. If the bank has advanced money in expectation of payment, and it is not paid, surely it can recover the amount back on an implied contract. If it has not advanced the money, it cannot be compelled to pay; for no principle is better settled than that a bank can be compelled by a depositor to pay a check only when in possession of actual money belonging to him. Why, then, should it not transfer back a check that is uncollectible; and why should this act be regarded as having much significance from any point of view? In a recent case the court lightly brushed aside this contention with the remark that it was "entirely immaterial

⁷² See §4, note 43.

⁷³ *Riverside Bank v. Woodhaven Junction Land Co.*, 34 N. Y. App. Div. 359; *Rapp v. National Security Bank*, 136 Pa. 426; *Armstrong v. National Bank*, 90 Ky. 431; *Bailie v. Augusta Sav. Bank*, 95 Ga. 277, 280; *Noble v. Doughten*, 83 Pac. (Kan.) 1048; *Ayres v. Farmers' & Merch. Bank*, 79 Mo. 421; *Flannery v. Coates*, 80 Mo. 444.

that by a book-keeping entry," the bank subsequently charged the amount of the check back to the depositor.⁷⁴

Another view may be given. A bank in receiving an ordinary check is quite like the purchaser of personal property. The vendor, by the common law, warrants the title, though not a word is said about the matter. The purchaser acquires a title so perfect that he can maintain an effective remedy against any violator of his property—except the true owner. But this possibility, that the vendor may not be the real owner and that the purchaser may be compelled to surrender it to the real owner, does not render the purchaser less of a real owner in the myriad purchases of such property.

A similar rule applies to sight drafts. Whenever, therefore, the owner of a bill sends it to a correspondent for collection and credit and at the same time draws at sight against the fund in anticipation of its collection, the title to the bill passes to the correspondent.⁷⁵

9. Loans on Fraudulent Representations. Effect on Surety's Liability.

Money loaned to a borrower on a fraudulent representation of his wealth may be recovered whenever it can be traced into any other form of property.⁷⁶ But after its identification is lost, for example, is used to purchase goods that are mixed with others, these cannot be taken as a substitute.⁷⁷

In like manner a misrepresentation to a lending bank of a surety's undertaking in the way of increasing his liability would doubtless operate to discharge him,⁷⁸ but to use a note thus endorsed as collateral security, instead of discounting it in fulfilment of the intention and expectation of all parties would

⁷⁴ *Riverside Bank v. Woodhaven Junction Land Co.*, 34 N. Y. App. Div. 359.

⁷⁵ *Clark v. Merchants' Bank*, 2 N. Y. 380.

⁷⁶ *Selover v. First Nat. Bank*, 77 Minn. 140. See §12.

⁷⁷ *Union Nat. Bank v. Goetz*, 138 Ill. 127. Equity will charge land for which payment is made partly in stolen money. *National Mahaiwe Bank v. Barry*, 125 Mass. 20. See §§10, 12 and Chap. VI. §9.

⁷⁸ 2 Rand. on Com. Paper, §952.

not release the sureties;⁷⁹ nor would the discounting of a note thus indorsed at another place than that mentioned and intended by the parties.⁸⁰ It is true the authorities disagree on these questions, but the rule as above stated is based on the sounder reason and is more generally observed.

10. Borrower's Warranty of Genuineness of Paper.

A borrower impliedly warrants the genuineness of the makers and endorsers;⁸¹ but in discounting a draft for the drawer the bank does not warrant to the acceptor the genuineness of the bills of lading attached thereto as security.⁸²

Therefore if the draft is paid by him supposing the bill of lading is genuine, he has no recourse against the bank after the discovery that it is a forgery.⁸³

(a.) This principle has been extended to cover other paper received by an agent from his principal and presented for discount. Thus a bank discounted a number of genuine drafts

79 *Bank v. Joyner*, 33 Vt. 481; *Bank v. Buck*, 5 Wend. (N. Y.) 66; *Commercial Bank v. Claiborne*, 5 How. (Miss.) 301.

80 *Keith v. Johnson*, 31 Vt. 268; *Bank v. Bingham*, 33 Vt. 621; *Farmers' Bank v. Humphrey*, 36 Vt. 554, 557; *Briggs v. Boyd*, 37 Vt. 534; *Bank v. Rand*, 38 N. H. 166; *Bank of Chenango v. Hyde*, 4 Cow. (N. Y.) 567; *Utica Bank v. Ganson*, 10 Wend. (N. Y.) 315.

Contra.—*Clinton Bank v. Ayres*, 16 Ohio 282; *Sherwin & Co. v. Bringham*, 39 Ohio St. 137; *Prescott v. Brinsley*, 6 Cush. (Mass.) 233; *Adams Bank v. Jones*, 16 Pick. (Mass.) 574; *Manufacturers' Bank v. Cole*, 39 Me. 188; *Dewey v. Cochran*, 4 Jones Law (N. C.) 184.

81 *Cabot Bank v. Morton*, 4 Gray (Mass.) 156.

82 See Chap. XVIII, §3. *Goetz v. Bank of Kansas City*, 119 U. S. 551, 555; *Hoffman v. Bank of Milwaukee*, 12 Wall. (U. S.) 181. As between a bank cashing a draft and the drawee who had the means of comparing the signature with other drafts he had paid, the loss for a forged draft must fall on the drawee. *Howard v. Miss. Valley Bank*, 28 La. Ann. 727. A paid a bank \$500 requesting a draft for that amount payable to a third person. The cashier drew a draft for the amount desired in figures, but directing payment of "five thousand dollars," which A, without examining, enclosed in an envelope and sent away. Some one added a cipher to the \$500 and the drawee paid the full amount, \$5,000. A was declared to be not liable for the \$4,500 as he had derived no benefit from the mistake. *City Nat. Bank v. Stout*, 61 Tex. 567.

83 *Ibid.*

for a factor, which were drawn on him by his principal. But another series drawn in the same manner, which proved to be forgeries, the factor was obliged to pay.⁸⁴

(b.) Though a note discounted by a bank be forged, the security given therefor, if negotiable and innocently received, is not thereby impaired and may be retained.⁸⁵ And a bank that discounts a forged note innocently presented by a debtor, for the purpose of applying the proceeds on his own note due to the institution, can recover the amount from him after the discovery of the forgery.⁸⁶

(c.) A bank that accepts its own notes in payment of a note from an innocent payor cannot recover the amount on the subsequent discovery that they are forged.⁸⁷

(d.) And a bank, after discovering the forgery of a discounted draft, can repudiate it and sue the drawer for the money.⁸⁸

11. To Whom Loans May be Made.

A bank has a wide latitude in its choice of borrowers; besides individuals and corporations generally, it can lend to other banking institutions.⁸⁹ Yet some prohibitions are imposed on lending to a bank's directors and other officers.⁹⁰

84 *Howar! v. Miss. Valley Bank*, 28 La. Ann. 727.

85 *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law 513. In this case the president of a bank forged two notes and had them discounted by another bank on the wrongful pledge of some negotiable collaterals belonging to his bank. It failed to recover them. A leaves with B a note which he wrongfully pledges with other securities for his own debt. If A pays his note he is entitled to have his money refunded provided the other securities pledged by B yield enough to pay his debt. *Farwell v. Importers & Traders' Nat. Bank*, 90 N. Y. 483.

86 *Second Nat. Bank v. Wentzel*, 151 Pa. 142; *Ritter v. Singmaster*, 73 Pa. 400; *West Phila. Nat. Bank v. Field*, 143 Pa. 473.

Contra.—*Grafton Bank v. Hunt*, 4 N. H. 488.

87 *Bank v. Bank*, 10 Wheat. (U. S.) 333; *Gloucester Bank v. Salem Bank*, 17 Mass. 33.

88 *Massengill v. First Nat. Bank*, 76 Ga. 341.

89 See §§20, 28.

90 *Albert v. Mayor of Baltimore*, 2 Md. 159. In New York a statute provided that no bank officer should borrow therefrom without the appro-

Where such prohibitions exist, a loan to a firm of which a director is a member is not an infraction of the law.⁹¹ Nor does a law imposing a penalty on a bank for lending more than a prescribed amount to a director prevent the recovery of the money;⁹² nor a general statute limiting the amount of loans of directors curtail the authority previously given by special charter.⁹³ Again, a bank may have authority to lend to some classes, but not to all; to producers, but not to exchangers.⁹⁴

(a.) A bank may discount negotiable paper for a principal through the solicitation of his agent. In such a transaction the bank must ascertain the extent of the agent's authority. If knowing no limitation thereon, it may rely on his apparent authority. If, therefore, a note is presented by him endorsed in blank, the bank is justified in relying on his apparent authority to sell it and receive the money therefor.⁹⁵

(b.) A bank may safely lend to an executor or administrator on the pledge of the property of the estate.⁹⁶ Such authority, though great, is confided to them in order that they may effectively perform their duties. Possessing this authority, their abuse of it, by applying the proceeds of loans to their own use, do not affect the rights of a bona fide pledgee.⁹⁷ And if the money loaned is deposited to the credit of the estate and

val of a majority of the directors, and that a violator should forfeit twice the amount of his loan to the state. Nevertheless a loan made by a bank teller without the approval of the directors was not void. *People's Trust Co. v. Pabst*, 98 N. Y. Supp. 1045.

91 *Richmond Bank v. Robinson*, 42 Me. 589; *Fisher v. Murdock*, 13 Hun (N. Y.) 485. A loan made to a director without any conditions prescribed by by-law in violation of the bank's charter, is void and cannot be recovered. *Arnold v. Reid*, 7 West. L. J. 410. See §19.

92 See *Iron & Glass Dollar Sav. Bank*, 12 Pa. Co. Ct. 42.

93 *Pemigewassett Bank v. Rogers*, 18 N. H. 255.

94 *Bank v. Williams*, 79 N. C. 129.

95 *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625.

96 *Lyman v. National Bank*, 181 Mass. 437; *Gottberg v. United States Nat. Bank*, 131 N. Y. 595; *Carter v. National Bank*, 71 Me. 448; *Smith v. Ayer*, 101 U. S. 320; *Weyer v. Second Nat. Bank*, 57 Ind. 198; *Lowry v. Com. & Farmers' Bank, Taney (U. S.)* 310. See Chap. XVI, §20.

97 *Ibid.*

afterward is drawn out on a check payable to the trustee's own order, his action is not regarded as a notice to the bank that he intends to misapply the fund.⁹⁸ But whenever he transfers the trust property to serve his individual purpose to one who knows its true character, both are in the wrong and the property may be recovered by the rightful owner.⁹⁹

Likewise a loan to an executor on the pledge of trust funds, the avails of which the pledgee knows the executor intends to divert to his own private use, can be recovered from the lender by the beneficiary.¹ But the courts go further in the way of protecting the owner of trust property. If the transferee or pledgee has reason to believe that the executor or administrator intends to misapply the property, it is his duty not to purchase it, nor to lend thereon as security.² In the words of Judge Taney, sitting as circuit judge, which have been on many occasions approved: "If a party dealing with an executor has, at the time, reasonable ground for believing that he intends to misapply the money, or is, in the very transaction, applying it to his own private use, the party so dealing is responsible to the persons injured."³ The evidence of perversion is varied. The sale of trust property much below its true value is often strong evidence that a misapplication of the proceeds is intended.⁴

(c.) A narrower rule applies to a technical trustee, because his authority is chiefly defined by the instrument creating his authority. In a recent well considered case the court remarked: "The legal presumption is that a trustee has no power to sell or convey the property that he holds in his fiduciary capacity."⁵ His position is a warning and declaration to all that

98 *Lyman v. National Bank*, 181 Mass. 437.

99 *Brockenbrough v. Turner*, 78 Va. 438; *Rogers v. Zook*, 86 Ind. 237; *Van Hoose v. Bush*, 54 Ala. 342; *Shelton v. Carpenter*, 60 Ala. 201; *Lowry v. Com. & Farmers' Bank*, Taney (U. S.) 310.

1 *Bell v. Farmers' Deposit Nat. Bank*, 131 Pa. 318.

2 *Lowry v. Com. & Farmers' Bank*, Taney (U. S.) 310.

3 *Ibid.*, p. 330.

4 *Brockenbrough v. Turner*, 78 Va. 438.

5 *Geyser-Marion Mining Co. v. Stark*, 45 C. C. A. 467.

he is without the power of disposition unless this is specifically derived, or granted by those having an interest in the property and also adequate authority to comply with the trustee's wishes.⁶ Consequently, in every case of this kind, it is the clear duty of the bank to inquire into the authority of the trustee to pledge or sell the trust property before final action.⁷

12. When Loans May be Rescinded.

A bank under some conditions may rescind a loan. Thus a bank need not pay a borrower who fails before receiving the money on his discounted paper. The authority of a bank to stop payment has been likened to a merchant's right of stopping the delivery of goods on learning of the buyer's failure.⁸

Again, a bank can rescind a loan contracted through the fraud of the borrower.⁹ Equally clear is the bank's right to rescind a loan made by its president or other loan officers who have abused their authority and loaned the bank's money in a fraudulent manner, though conforming perhaps outwardly to the usual methods of doing the business.¹⁰ Nor need the rescission be made promptly; action within a reasonable time after discovering the fraud will suffice.¹¹

In like manner an individual who has loaned money to a bank, or to one of its officers, may, on the discovery of a fraud

6 Ibid.

7 *Loring v. Brodie*, 134 Mass. 453; *Shaw v. Spencer*, 100 Mass. 382; *Haywood v. Carr*, 100 Mass. 273. By describing the payee of a note as trustee its negotiability is not destroyed, nor the way opened for making defences against a bona fide holder for value by indorsement before maturity. *Bank v. Looney*, 99 Tenn. 278.

8 *Dougherty v. Central Bank*, 93 Pa. 227; *Lancaster Co. Nat. Bank v. Huver*, 114 Pa. 216; *Bank v. Union Trust Co.*, 50 Ill. App. 434. See §9.

9 A borrower procured by fraud a loan from B bank, adding the request to credit the amount to B's bank, to which he was indebted. This was done by notifying C bank that credit had been given thereto as requested. The C bank credited the amount on a loan due from A. The B bank on learning the true nature of the transaction, was justified in rescinding the loan to A and cancelling the credit to the C bank. *Selover v. First Nat. Bank*, 77 Minn. 140.

10 *Hicks v. Steel*, 126 Mich. 408.

11 Ibid.

in making it, rescind the loan and recover through proper legal action the money.¹²

13. Payment of a Loan by Crediting Borrower's Account.

In lending to a depositor the amount is usually credited to his account. As such crediting, so some courts maintain, is not payment until the money is drawn out, the bank until that time is not a holder for value. Consequently, the bank may, should it learn of any defence to the loan, return the note to the borrower and cancel the credit.¹³ Perhaps it may be difficult to harmonize this rule with another already mentioned, that a check credited to a depositor with the right to draw immediately against it, belongs to the bank whether the depositor has exercised his option or not,¹¹ in states where both rules prevail, but perfect legal harmony nowhere exists.

14. Security for Present Loan. Stock of Lending Bank. Bills of Lading.

Incidental to the power of discounting, a bank may secure loans in any manner not prohibited by statute. To this end it has a very wide latitude in taking personal property;¹⁵ and in some states real estate also may be taken.¹⁶

¹² *Manhattan Life Ins. Co. v. Farmers & Citizens' Nat. Bank*, 10 Blatchf. (U. S.) 344.

¹³ *City Deposit Bank Co. v. Green*, 103 N. W. (Iowa) 96; *First Nat. Bank v. Mt. Pleasant Milling Co.*, 103 Iowa 518; *Manufacturers' Nat. Bank v. Newell*, 71 Wis. 309 and cases cited; *Drovers' Nat. Bank v. Blue*, 110 Mich. 31; *Mann v. Second Nat. Bank*, 30 Kan. 412; *Fox v. Bank*, 30 Kan. 441; *Dreilling v. National Bank*, 43 Kan. 197; *Central Nat. Bank v. Valentine*, 18 Hun (N. Y.) 417, citing cases.

¹⁴ See §8.

¹⁵ *Commercial Bank v. Nolan*, 7 How. (Miss.) 508; *Farmers & Millers' Bank v. Detroit R.*, 17 Wis. 372; *Bates v. Bank*, 2 Ala. 451; *Westminster Nat. Bank v. N. E. Electrical Works*, 73 N. H. 465. Unless restricted by its charter a bank may take a mortgage to secure anticipated liabilities. *Crocker v. Whitney*, 71 N. Y. 161. And though the law provides that the mortgage must be made to the president of the bank, if made to the bank itself it is equally valid, for this requirement is simply to facilitate the business and not to prevent the bank from taking the title. *Kennedy v. Knight*, 21 Wis. 340. And a mortgage taken to secure a loan made at the time is valid when authority exists to take a mortgage to secure

A national bank is forbidden to take for a present loan its own stock or real estate as security,¹⁷ and so are some of the state¹⁸ and Canadian banks.¹⁹

In discounting a draft to which is attached a bill of lading, the merchandise therein described becomes the bank's property and cannot be taken by any creditor of the shipper.²⁰ And the

debts previously contracted. *Silver Lake Bank v. North*, 4 Johns. Ch. 370. A borrowed money from a bank, signing the note with his wife and B as surety. To secure B, A's wife executed a mortgage on her land. The note, after several renewals, remained unpaid and the surety failed. The bank, so the court held, might be subrogated to the lien of the surety on the land. *Magoffin v. Boyle Nat. Bank*, 24 Ky. L. Rep. 585. A bank that discounts a note not knowing at the time it is secured by a deed of trust violates no law; and, as the deed is an incident of the debt, passes with the note and may afterward be claimed and enforced. *George v. Somerville*, 153 Md. 7. A national bank may take shares of a land improvement company as collateral. *Union Nat. Bank v. Touzalin Imp. Co.*, 95 N. W. (Neb.) 489. A national bank can take United States bonds as collateral. *Third Nat. Bank v. Boyd*, 44 Md. 47. Also the stock of another national bank. *National Bank v. Case*, 99 U. S. 628. A contract between two banks whereby the lending bank is to have all the collateral in its possession belonging to the other for advances, includes deposits. *Fisher v. Continental Nat. Bank*, 64 Fed. 707. A bank may take a crop of cotton as security and ship the same to a factor to be sold. *Deloach v. Jones*, 18 La. 447. The holders of two notes, executed at the same time, payable at different dates, but secured in the same manner, are entitled to share pro rata therein, nor is the rule affected by the assignment of the notes to different parties. *First Nat. Bank v. Andrews*, 7 Wash. 261.

16 *Merchants' State Bank v. Tufts*, 103 N. W. (N. Dak.) 760. See §17.

17 *Goodbar v. City Nat. Bank*, 78 Tex. 461; *Conklin v. Second Nat. Bank*, 45 N. Y. 655; *Second Nat. Bank v. National State Bank*, 10 Bush (Ky.) 367; *Feckheimer v. National Ex. Bank*, 79 Va. 80; *Bullard v. Bank*, 18 Wall. (U. S.) 589.

18 Conn. Rev. St. Tit. 3, §226. See *Vansands v. Middlesex Co. Bank*, 26 Conn. 144; Minn. Laws, 1881, Ch. 77, §3. See *St. Paul & Minneapolis Trust Co. v. Jenks*, 57 Minn. 248. In Missouri a bank may receive its own stock for a present or past debt. *Dalzell v. Commercial Bank*, 82 Mo. App. 254.

19 *Banking Act*, '34 Vict. Chap. 5, §40; *Bank of Toronto v. Perkins*, 8 Can. S. C. R. 603.

20 *Temple Nat. Bank v. Louisville Cotton Oil Co.*, 82 S. W. (Ky.) 253; *Sabel v. Planters' Nat. Bank*, 110 Ky. 299, and cases cited.

drawer who has it discounted with a bill of lading attached as collateral at a bank to which he is indebted guarantees the honoring of the draft on presentment. Consequently, if it is dishonored, he is bound to pay an equivalent sum, and the bank's lien on the property covered by the bill of lading continues until payment is effected.²¹

15. Individual Loan to Bank Officer With His Bank Stock as Security.

One who receives from a bank officer its notes and other property as security for the payment of his personal debt does so at the receiver's peril.²² Nor is the bank estopped from showing that the stock thus received was fraudulently issued by one of its officers as security for his private debt.²³ Again, an officer who abstracts from the custody of the bank a certificate, supposed to have been cancelled, but which was not, and pledges it for his personal indebtedness, conveys no title thereto even to an innocent pledgee.²⁴

The authority of a bank officer to lend the bank's money to himself without authority of the directors is by some states positively prohibited. "Indeed," in a recent case the court remarked, "the confidence ordinarily reposed in the managing officers of a bank both by directors and the public is such that to permit a loan of its money, or that due depositors to them, under any circumstances, seems of doubtful propriety."²⁵ But the sale by a borrowing officer of his notes given to the bank

21 *Kentucky Refg. Co. v. Bank of Morilton*, 89 S. W. (Ky.) 192; *National Bank v. Citizens' Nat. Bank*, 93 S. W. (Tex. Civ. App.) 209. A bank receives as security a bill of lading for cotton which is deposited with a compress company that issues a non-negotiable receipt therefor, which is exchanged for the bill of lading. The bank still retains its right to the cotton. *Ibid.*

22 *Wilson v. Metropolitan R.*, 120 N. Y. 145; *Wheeler v. Home Sav. Bank*, 188 Ill. 34. See Chap. IX, §38.

23 *Farrington v. South Boston R.*, 150 Mass. 406.

24 *Farmers' Bank v. Diebold Safe Co.*, 66 Ohio St. 367.

25 *Iowa, Acts, 15th Gen. Assembly*, §17, Ch. 20, p. 52; *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737, 740.

and its retention of the proceeds will operate as a ratification of the loan thus made to himself in violation of the law.²⁶

16. Negotiation of Security is Not Affected by Illegality of Loan.

A person who makes a loan for an illegal purpose, for example, to obtain money for speculation, cannot defend on the ground that the bank knew the illegal purpose of the borrower.²⁷ But if he can establish a "case of pernicious activity on the part of the bank in furthering the gaming transaction, [this] would render the note and security void."²⁸ Evidently what would be "pernicious activity" is a question of fact to be ascertained in the usual manner.²⁹

Again, a party who makes an illegal loan of a bank cannot, so long as he retains the money, restrain the bank from negotiating the securities it has received from him, nor compel their cancellation and return.³⁰

17. What Security May be Taken for Past Debts.

Banks have ample authority to take real property to secure themselves from losses on loans made at a former time. The

²⁶ *Ibid.* A cashier executed his individual notes to his bank and others as treasurer of a company. All of them he sold to a third person. The company note was renewed several times by the cashier as treasurer, and the new notes were indorsed by him as cashier. The individual notes were renewed several times with the bank's guaranty. Yet the bank was not bound by the guaranty for the third person took them knowing that the cashier could not deal with himself individually or as treasurer of the company. *German Sav. Bank case*, 122 Iowa 737. By statute, officers of an investing committee of a company have been prohibited from borrowing for themselves. Yet an officer did borrow, pledging negotiable bonds of an innocent third person as security. The statute was held to be directory, and as the company had no knowledge of the fraud, it acquired title to the bonds. *Bowditch v. N. E. Mutual Life Ins. Co.*, 141 Mass. 292.

²⁷ *Singleton v. Bank of Monticello*, 113 Ga. 527; *Baker v. McGrath*, 106 Ga. 419, 421; *Waugh v. Beck*, 114 Pa. 422; *Jackson v. City Nat. Bank*, 125 Ind. 347.

²⁸ *Singleton v. Bank*, 113 Ga. 527.

²⁹ *Ibid.*

³⁰ *Elder v. First Nat. Bank*, 12 Kan. 238. A bank having notice that notes and a mortgage securing them are a fraud cannot hold the notes as collateral. *Baldwin v. Davis*, 118 Iowa 36.

national ³¹ and state laws ³² endow banks with adequate authority in this regard; if they did not the safety of these institutions would be endangered.³³ But security thus taken by a national bank must be sold within five years.³⁴

31 See Chap. IV, §8. *First Nat. Bank v. National Ex. Bank*, 92 U. S. 122; *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405; *Tourtelo v. Whithed*, 9 N. Dak. 467, and many cases cited; *Richards v. Kountze*, 4 Neb. 200; *Woods v. People's Nat. Bank*, 83 Pa. 57; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Mapes v. Scott*, 94 Ill. 379; *Libby v. Union Nat. Bank*, 99 Ill. 622; *Gaar v. First Nat. Bank*, 20 Ill. App. 611; *Allen v. First Nat. Bank*, 23 Ohio 97; *Ornn v. Merchants' Nat. Bank*, 16 Kan. 341; *Heath v. Second Nat. Bank*, 70 Ind. 106; *Upton v. National Bank*, 120 Mass. 153; *Holmes v. Boyd*, 90 Ind. 332; *Spafford v. First Nat. Bank*, 37 Iowa 181; *First Nat. Bank v. Elmore*, 52 Iowa 541; *Union Nat. Bank v. Hunt*, 7 Mo. App. 42.

32 *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *Taylor v. Miami Ex. Co.*, 6 Ohio 176; *Coppin v. Greenlees*, 38 Ohio St. 275, 279; *Morgan v. Lewis*, 46 Ohio St. 1, 6; *Farmers & Millers' Bank v. Detroit R.*, 17 Wis. 372; *Reynolds v. Simpson*, 74 Ga. 454; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Fidelity Ins. Co. v. German Sav. Bank*, 127 Iowa 591; *State Security Bank v. Hoskins*, 106 N. W. (Iowa) 764; *Alexander v. Brummett*, 42 S. W. (Tenn.) 63; *Merchants' State Bank v. Tufts*, 103 N. W. (N. Dak.) 760. See *Lagow v. Badollet*, 1 Blackf. (Ind.) 416 and *Brown v. Bradford*, 103 Iowa 378.

Though a bank is forbidden by its charter "to deal or trade in anything except bills of exchange," it can take an assignment of a mortgage to cover a debt due to the bank. *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117; or a book account. *Santa Fe Ex. Bank v. Dick*, 73 Mo. App. 354; *Bank of North America v. Tamblyn*, 7 Mo. App. 570. If a bank can lend only on the mortgage of cultivated land, the mortgagee or any other interested party cannot defend against the loan on the ground that the ground is uncultivated. *Barrow v. Bank of La.*, 2 La. Ann. 453. The question concerns only the stockholders and the state. And if a bank buys land to secure an existing debt, a tenant cannot refuse to deliver possession on the ground that the bank had exceeded its authority in selling to another bank. *Miller v. National Bank*, 4 Ky. L. Rep. 25. In Kansas while a bank is forbidden from lending on the security of its stock, or becoming the purchaser except to prevent a loss on a past debt, it can acquire a lien on the stock of a member who has become liable as principal, surety or otherwise for a debt not incurred on such security. *Batthey v. Eureka Bank*, 62 Kan. 384.

33 The phrase, "debt previously contracted in good faith," used in many states means loans honestly made in the belief that they were safe investments for the bank, and that there was an absence of fraud, pretence, or any purpose to wrong the bank. *Batthey v. Eureka Bank*, 62 Kan. 384,

There is an important limitation, however, in the authority of national banks to take property. While it may take the stock of a manufacturing company, for example, it cannot reorganize the company and retain its interest in the new organization.³⁵ The highest court condemns the proceeding as "a speculative venture," which on no ground can be justified. This authority is broad enough to take almost any kind of property, including real estate, the stock of the lending bank and that of other corporations.³⁶

Perhaps national banks have not as much latitude as state institutions; they certainly have not the right to take shares in a partnership formed to purchase and improve real estate. And if a national bank does thus invest some of its resources, it is not estopped from denying the partnership relation and also liability as a partner.³⁷

18. What Use and Disposition May be Made of It.

Besides, banks possess large powers to utilize the property they take to secure a past indebtedness.³⁸ Indeed it may do whatever is needful to render productive the property thus taken. Many illustrations are given in a note.³⁹

394; *Docter v. Furch*, 91 Wis. 464; *Winters v. Haines*, 84 Ill. 585. A bank which through its managing officers procures a note to be made illegally by a corporation to secure a debt due the bank from one of its members is not a bona fide holder, and the vice is not cured by transferring it to an innocent holder who then transfers it back again. It is in effect the same note. *Hatch v. Johnson Loan & Trust Co.*, 79 Fed. 828.

34 Rev. Stat. §5137.

35 *First Nat. Bank v. Converse*, 200 U. S. 425.

36 *Westminster Nat. Bank v. N. E. Electrical Works*, 62 At. (N. H.) 971; *Hill v. Shilling*, 95 N. W. (Neb.) 24; *Tourtlot v. Whithed*, 9 N. Dak. 467, and cases cited; *First Nat. Bank v. National Ex. Bank*, 92 U. S. 122; *Holmes & Griggs Mfg. Co. v. Holmes & Werrell Metal Co.*, 127 N. Y. 252, and cases cited. See cases in notes 31, 32.

37 *Merchants' Nat. Bank v. Wehrman*, 202 U. S. 295, revg. 69 Ohio St. 160.

38 See Chap. IX, §21.

39 A bank can purchase a judgment and other liens on land whereon it holds a mortgage in order to clear the title and render its own interest more valuable. *Brown v. Hogg*, 14 Ill. 219; *Cockrill v. Cooper*, 58 U. S.

19. Consequences of Making Illegal Loans. Ultra Vires.

Though the contract of a national ⁴⁰ or state bank ⁴¹ that transgresses the law and takes unauthorized security cannot be enforced, the money can be recovered, especially as the borrower is a participant in the wrong. The government can deal effectively with the offending bank without applying the happy punishment proposed by the offending debtor. It can admon-

App. 648, 660; *Mutual Life Ins. Co. v. Yates Co. Nat. Bank*, 35 N. Y. App. Div. 218; *McCraith v. Nat. Mohawk Valley Bank*, 104 N. Y. 414. It can take merchandise and sell the same. *Sacket's Harbor Bank v. Lewis Co. Bank*, 11 Barb. (N. Y.) 213. A bank, knowing the desire of a shipper of goods, to have them sent and escape, if possible, seizure by his creditors, is justified in having them sent in the president's name to secure the bank for an advance made by the shipper. *Lee v. Marion Sav. Bank*, 108 Iowa 716. A bank can purchase the stock of a bank, pledged as a loan in payment of it. *Latimer v. Citizens' State Bank*, 102 Iowa 162. A bank can purchase a stock of raw material and work it up into a different product. *Lippincott v. Longbottom*, 6 Pa. Co. Ct. 503. It can purchase any personal property at a sale on an execution in its own favor, or under a mortgage or pledge of the property taken as security for a debt. *Farmers & Millers' Bank v. Detroit R.*, 17 Wis. 372.

The want of a bank's power to purchase and hold real estate does not invalidate an arrangement whereby land on which the bank has a lien and is otherwise encumbered, is relieved of this outside encumbrance with the bank's money and is then sold and the proceeds are realized by the bank, the title not passing through the bank or trustees acting therefor. *Zantingers v. Gunton*, 9 Wall. (U. S.) 32. A bank can take wheat and have it prepared for the market. *Hill v. Bank of Seneca*, 87 Mo. App. 590. And sell it on credit. *First Nat. Bank v. Peavy Elevator Co.*, 10 S. Dak. 167. A bank can improve a farm taken for a debt and buy wheat for seeding. *First Nat. Bank v. Bannister*, 7 Kan. App. 787; *Cooper v. Hill*, 36 C. C. A. 402, 405. A bank can even take, repair and conduct a hotel rather than incur loss from a debt. *Marshall v. Bank*, 76 Mo. App. 92. In Colorado the courts have refused to sanction the conduct of a bank that engaged in mining business to save a debt. *Weston v. Estey*, 22 Colo. 334. Likewise the court of Kentucky a bank that was conducting a manufacturing business for the same purpose. *Louis Bletz & Co. v. Bank*, 55 S. W. 697. A cashier may agree to pay one a commission for procuring a purchaser of real estate held as security for a debt. *First Nat. Bank v. Ratliff*, 76 S. W. (Tex. Civ. App.) 591.

⁴⁰ *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Mapes v. Scott*, 94 Ill. 379; *Penn v. Bornman*, 102 Ill. 523, 534; *Thornton v. National Exchange Bank*, 71 Mo. 221; *Graham v. National Bank*, 32 N. J. Eq. 804; *Meyers v. Campbell*, 64 N. J. Law 186; *Simons v. First Nat. Bank*, 93 N. Y. 269; *Wroten v. Armat*, 31 Gratt.

ish the bank for disregarding the law and follow this by taking away its charter, should the offence be repeated. In no case can a third person attack the validity of a contract on this ground.⁴²

The most frequent violations by state and national banks have consisted in lending to a customer in excess of the legal

(Va.) 228; *Winton v. Little*, 94 Pa. 64; *Turner v. First Nat. Bank*, 78 Ind. 19; *Oldham v. First Nat. Bank*, 85 N. C. 240; *First Nat. Bank v. Elmore*, 52 Iowa 541; *State Nat. Bank v. Flathers*, 45 La. Ann. 75; *First Nat. Bank v. Grosshans*, 61 Neb. 575. A national bank has authority to take an assignment of a note and mortgage on real estate for money loaned on the mortgage. *First Nat. Bank v. Andrews*, 7 Wash. 261. A national bank may lend on the security of a mortgage if the United States does not object. *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439. "The doctrine of ultra vires is a most powerful weapon to keep private corporations within their legitimate offices, and to punish them for their violation of their corporate charters, and it probably is not invoked too often; but to place that power in the hands of the corporation itself, or a private individual to be used by it or him as a means of obtaining or retaining something of value which belongs to another, would turn an instrument intended to effect justice between the state and corporation into one of fraud as between the latter and innocent parties." *Marshall, J., Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 131. A bank which receives from its debtor property worth more than the debt and agrees to pay the surplus to other creditors, cannot escape executing the contract on the ground of ultra vires. *Tootle v. First Nat. Bank*, 6 Wash. 181. The borrower of a national bank cannot defeat a recovery on the ground that it took its stock as security. *Brown v. Ohio Nat. Bank*, 18 App. Cases, (D. C.) 598.

41 *Rome Sav. Bank v. Krug*, 102 N. Y. 331; *N. Y. State Loan & Trust Co. v. Helmer*, 77 N. Y. 64; *Pratt v. Short*, 79 N. Y. 437. In Ohio it was decided in 1858 that if a bank discounted a note without authority it was void, but an action could be maintained to recover the money loaned. *Vanatta v. State Bank*, 9 Ohio St. 27. Though a bank cannot recover on the note, it can recover the money loaned. *Phila. Loan Co. v. Towner*, 13 Conn. 249; *Life & Fire Ins. Co. v. Mechanics' Ins. Co.*, 7 Wend. (N. Y.) 31, 34; *Utica Ins. Co. v. Scott*, 19 Johns. (N. Y.) 1; *Beach v. Fulton Bank*, 3 Wend. (N. Y.) 573, 583; *Utica Ins. Co. v. Kip*, 8 Cow. (N. Y.) 20.

42 *Smith v. First National Bank*, 45 Neb. 444; *Buchanan v. Saunders Co. Nat. Bank*, 94 N. W. (Neb.) 631. "The capacity of a corporation to [contract] cannot be called in question in a collateral way, but by the state and not by a private suitor. This doctrine applies to all classes of actions and in every variety of cases." *Conn. Mutual Life Ins. Co. v. Smith*, 117 Me. 261, 289.

amount;⁴³ in lending on improper securities;⁴⁴ or on the faith of worthless or improper endorsers;⁴⁵ in discounting or endorsing without authority;⁴⁶ in purchasing notes,⁴⁷ stocks and bonds;⁴⁸ in receiving deposits when insolvent;⁴⁹ and issuing or purchasing negotiable or post-dated paper.⁵⁰

Formerly *ultra vires* were magical words with which one party or the other to corporation-contracts could juggle to defeat their execution. "The safety of men," Lord St. Leonards has remarked, "in their daily contracts requires that this doc-

43 *Bond v. Central Bank*, 2 Kelly (Ga.) 92; *McClintock v. Central Bank*, 120 Mo. 127; *Bates v. Bank of the State of Ala.*, 2 Ala. 451. See *Workingmen's Bkg. Co. v. Rautenberg*, 103 Ill. 460. See §23.

44 *Allen v. Freedman's Sav. & Trust Co.*, 14 Fla. 418; *Bond v. Central Bank*, 2 Kelly (Ga.) 92; *Smith v. First Nat. Bank*, 45 Neb. 444. The prohibition of a loan of money on stock and other personal securities will not avoid a pledge of stock and thereby defeat the action of the broker employed by the bank to sell the stock. *Sistare v. Best*, 88 N. Y. 527. If a bank takes stock in another corporation as a pledge for a contemporaneous loan, contrary to law, it cannot enforce its transfer. *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350.

45 *Bond v. Central Bank*, 2 Kelly (Ga.) 92; *Richmond Bank v. Robinson*, 42 Me. 589; *National Bank v. Burr*, 27 Hun (N. Y.) 109.

46 *St. Joseph Fire & Marine Ins. Co. v. Hauck*, 71 Mo. 465; *Pratt v. Short*, 79 N. Y. 437; *Rome Sav. Bank v. Krug*, 102 N. Y. 331; *Vanatta v. State Bank*, 9 Ohio St. 27. The holder of paper issued by a corporation having authority to issue it, may rightfully assume that it was properly issued and cannot be impeached for any inferiority. For example, if it were made for the accommodation of a third person, this would be no defence against a bona fide holder. *Gelpcke v. City of Dubuque*, 1 Wall. (U. S.) 175.

47 *National Pemberton Bank v. Porter*, 125 Mass. 333; *Smith v. Philadelphia Nat. Bank*, 34 Leg. Int. (Pa.) 86; *Neilsville Bank v. Tuthill*, 4 Dak. 295. See *Mt. Vernon Bank v. Porter*, 52 Mo. App. 244.

48 In several cases the purchase of bonds has been declared *ultra vires* and the contracts relating to them could not be enforced. *Talmage v. Pell*, 7 N. Y. 328; *Tracy v. Talmage*, 2 Edm. Sel. Cas. (N. Y.) 467; modified in an elaborate opinion, 14 N. Y. 162. Purchases that were sustained. *Town of Lexington v. Union Nat. Bank*, 75 Miss. 1; *Lantry v. Wallace*, 97 Fed. 865, *affd.* U. S.; *First Nat. Bank v. Smith*, 8 S. Dak. 7.

49 See Chap. VI, §6.

50 *Safford v. Wyckoff*, 4 Hill (N. Y.) 442; *Leavitt v. Yates*, 4 Edw. Ch. (N. Y.) 134; *Bank v. Dodge*, 8 Barb. (N. Y.) 233; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490.

trine of ultra vires should be confined within narrow bounds."⁵¹ At last courts have found a way to sustain the majesty of the law and still prevent one party from invoking ultra vires to wrong the other. They may deal with a contract thus branded in several ways.

(a.) If the ultra vires consists, not in doing an act, but in doing it the wrong way, this will constitute no defence to its enforcement.⁵² Or, if the wrongful act consists in an excess, for example, in taking more than the legal rate of interest, the act is not wholly void, but only the legal excess.⁵³

(b.) If the contract is executory, it will not be enforced.⁵⁴

(c.) If it has been executed, the courts will leave both parties to find their way out of the maze as best they can.⁵⁵

(d.) If it has been executed by one party and not by the other, the courts have at least three ways of dealing with it.

(d, 1.) One way is to disregard the contract and permit the party who has executed it to recover on an implied contract the money paid, or for the worth of the thing received, or for the service rendered. This is the federal rule.⁵⁶ By this view as the ultra vires contract is contrary to law, it cannot be recognized and enforced; but the party who seeks to reap an ad-

51 *Eastern Counties Co. v. Hawkes*, 5 H. of L. Cases (Eng.) 331, 370.

52 See *McPherson v. Foster*, 48 Iowa 48 and *Bird v. Daggett*, 97 Mass. 494.

53 *Farmers' Bank v. Burchard*, 33 Vt. 346; *Blandel v. Isaac*, 13 Md. 202.

54 *Holt v. Winfield Bank*, 25 Fed. 812; *Long v. Ga. Pacific R.*, 91 Ala. 519; *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 252, 260; *Nassau Bank v. Jones*, 95 N. Y. 115; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 141; *Bradley v. Ballard*, 55 Ill. 413; *McNulta v. Corn Belt Bank*, 164 Ill. 427.

55 *National Bank v. Stewart*, 107 U. S. 676; *Tourtelot v. Whithed*, 9 N. Dak. 467; *McNulta v. Corn Belt Bank*, 164 Ill. 427; *Workingmen's Bkg. Co. v. Rautenberg*, 103 Ill. 460; *Long v. Ga. Pacific R.*, 91 Ala. 519; *Thomas v. Railroad Co.*, 101 U. S. 71, 85; *Parish v. Wheeler*, 22 N. Y. 494; *Montgomery Nat. Bank v. McCleaster*, 2 Pa. Dist. 546.

56 In *Fifth Nat. Bank v. Pierce*, 117 Mich. 376, 379, it was declared that conceding that credit was extended by the bank because of the security offered by the mortgage, it does not follow that the mortgage is void, citing *National Bank v. Matthews*, 98 U. S. 621; *Butterworth v. Kritzer Milling Co.*, 115 Mich. 1.

vantage thereby must nevertheless do the rightful thing. Thus a borrower from a bank who interposes this defence to a recovery *on the contract* succeeds, but he cannot retain the money. It must be returned, and an action therefor on an implied contract can be sustained. A mortgagor can have a mortgage taken by a bank contrary to law set aside, nevertheless he must return the money.⁵⁷

(d, 2.) A broader view is to permit such a recovery as justice fully requires, which is not limited simply to the recovery of money or other property.⁵⁸

(d, 3.) The third view is to recognize and enforce the contract, and leave the state to deal with the guilty party or parties in some other way.⁵⁹ In a recent New Jersey case, the court declared that *ultra vires* was not a proper defence for a party to a proper contract to make as a reason for not executing it; the state alone was the proper authority for considering this accusation.⁶⁰

57 Southern B. & L. Assn. v. Casa Grande Stable Co., 128 Ala. 624.

58 See Bradley v. Ballard, 55 Ill. 413, 417-419, and Rider Life Raft Co. v. Roach, 97 N. Y. 378.

59 Peoria & Springfield R. v. Thompson, 103 Ill. 187; Whitney Arms Co. v. Barlow, 63 N. Y. 62. "Although a contract entered into by the agents or officers of a private corporation is *ultra vires*, and therefore not binding on the company as long as it remains executory, yet if the company in such case knowingly permits the other contracting party, without objection, to go on and perform the contract on his part, and thereby obtains and appropriates to its own use money, property or labor in furtherance of some legitimate corporate purpose, it will be estopped from denying its liability on such a contract." Mulkey, J., Peoria & Springfield R. v. Thompson, 103 Ill. 187, citing Bradley v. Ballard, 55 Ill. 413; Chicago Bldg. Society v. Crowell, 65 Ill. 453; City of East St. Louis v. East St. Louis Gas Light Co., 98 Ill. 415; Darst v. Gale, 83 Ill. 136, 140. See National Home B. & L. Assn. v. Home Sav. Bank, 181 Ill. 35. Chap. I, §25f.

60 First Nat. Bank v. Greenville Oil & Cotton Co., 24 Tex. Civ. App. 645. For other cases see American Nat. Bank v. National Wall Paper Co., 23 C. C. A. 33. "It may be considered as settled law to-day that where a corporation goes outside the scope of its legitimate business and makes a contract, and that contract is executed and the corporation has received the benefit of the contract, the courts will never listen to the plea of *ultra vires*. It also, I think, may be laid down as within the limits of many decisions and good law that where the contract is within the general scope

All corporation contracts should be regarded in two aspects, their private and their public side. If a contract is not immoral or contrary to public policy, and has been executed by one party, there is no reason why the other should not be required to execute it. The authority of the individual or the corporation to make it are matters that ought not to enter into the question of its enforcement. If the corporation has not the authority, that question, as Justice Clayton ⁶¹ remarked sixty years ago, was one "with which individuals have no concern. If they deal with a bank, and get all they contract for, and are not disturbed in its enjoyment, it is difficult to see on what ground they can object a want of power in the bank to have granted it." On the other hand, if the bank has usurped its authority, it "is responsible to the state, but not to those who have dealt with it;" the public, not the individual, has been injured by its conduct, and the public alone has the right to

of the business of corporations of that character, though beyond the powers actually vested in the particular contracting corporation, parties who make the contract, in ignorance of the peculiar limitations in the special corporate form of this individual corporation, are not prejudiced by them. It may also be laid down as a third proposition that wherever a contract has been entered into which is beyond the powers of the corporation, and other parties have acted upon the faith of that contract and parted with money or value, and the relations of parties have become so changed that the status ante and the contract cannot be restored, the court will not listen to a plea of *ultra vires*." *Brewer, J., Holt v. Winfield Bank*, 25 Fed. 812, 813.

If a bank enters into a partnership, it must nevertheless account to the other partner, as though it had authority to become a partner. *Boyd v. Am. Carbon-Black Co.*, 182 Pa. 206. If a bank sign the bond of a county as a surety that its money shall be deposited in an incorporated bank, which is violated by depositing with a private banker, it is nevertheless liable. *Buhrer v. Baldwin*, 137 Mich. 263. If a bank can lend only on the mortgage of cultivated land, the mortgagee or any other interested party cannot defend against a loan on the ground that the land is uncultivated. *Barrow v. Bank of La.*, 2 La. Ann. 453. See also *Deming v. State*, 23 Ind. 416. If a bank lawfully buys land to secure an existing debt, a tenant cannot refuse to deliver possession because the bank has exceeded its authority in selling the land to another bank. *Miller v. National Bank*, 4 Ky. L. Rep. 25.

61 *Grand Gulf Bank v. Archer*, 8 Sm. & M. (Miss.) 151, 180.

complain. The law clearly recognizes this double aspect of many transactions. A stockholder, for example, who has sold his stock without transferring it, is regarded, in his relation to a purchaser, as no longer the owner, while he still may be in his relation to the bank. Had the courts always observed the double aspect of corporation contracts, legal tribunals would have heard much less of *ultra vires* transactions. At last this double aspect of dealing with corporations is now everywhere recognized, and the defence is rapidly losing its effectiveness.

By the modern law, as the party who seeks to take advantage of *ultra vires* to escape executing his contract is obliged to do equity before he can avail himself of this defence, it no longer proves an effective shield to defeat the fulfillment of a just obligation.

(d, 4.) A somewhat narrower interpretation is given to the national banking law by the federal tribunals. They plainly declare that in lending and similar transactions,—occasions on which a valuable consideration has been given, or service rendered by one party to the other,—restitution must be made, that *ultra vires* cannot be used as a subterfuge, beneath which the guilty party can hide and escape. In thus requiring restitution, the specific contract is ignored, and recovery is based on the ordinary principles of justice. In short, there may be a recovery in all cases wherein the specific unlawful contract is not directly recognized. But in other cases in which one party that has executed a contract demands its specific execution by the other, or damages for its non-execution, the federal courts withhold relief. And this has been denied on many occasions.⁶²

This more rigid adherence by the highest federal tribunal to the *ultra vires* doctrine grows out of a different conception of the transaction falling within the inhibition. The federal court plainly declares that an *ultra vires* contract is “wholly void and of no legal effect. The objection to the contract is, not

62 See note 23.

merely that the corporation ought not to have made it, but that it could not make it."⁶³ The view prevailing with many state courts is that an ultra vires contract imports, not that the corporation could not, but that it ought not to have made it.⁶⁴

By the federal view, as the contract does not exist, it cannot for any purpose be enforced, and all relief from the transaction must be founded on the simple principle of justice, or on an implied contract. Consequently relief in many cases fails. But in the states where the making of such contract is recognized as a fact, damages and other relief, as we have seen, spring therefrom.

The following cases clearly illustrate the different results flowing from these diverse conceptions: In Massachusetts a contract was made with a national bank, whereby a man agreed to secure a valuable depositor to a bank, in return for applications for insurance. He performed his part, and the bank shielded itself behind the doctrine of ultra vires from furnishing the applicants, and the court sustained the defence.⁶⁵ In Nebraska the president of a national bank agreed with A that if he would act as director of the bank, after its organization, and give it his business, the bank would give him ten shares of its stock. A, having fulfilled his part, sued the bank after its failure to deliver the stock, for its value, and recovered.⁶⁶

In the former case the court, following the federal conception of ultra vires in its application to a national bank, denied all relief; in the Nebraska case, the court, not understanding the federal conception, for it had not then been so clearly expounded, granted relief. Much of the disharmony in the older cases grows out of this ambiguous conception of an ultra vires act.

The federal conception, of course, is binding on the state courts in all national bank transactions, and is generally, but

63 *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 59, 60.

64 *Bissell v. Michigan Southern R.*, 22 N. Y. 258, 262; *Neilsville Bank v. Tuthill*, 4 Dak. 295.

65 *Dresser v. Traders' Nat. Bank*, 165 Mass. 120.

66 *Rich v. State Nat. Bank*, 7 Neb. 201.

not always, faithfully followed. In some of them no distinction is made in cases between a national bank and another party, and between other corporations and other parties. Thus in *Pronger v. Old National Bank*,⁶⁷ Justice Fullerton has said: "Whatever the rule may have been formerly, it is now settled beyond controversy that a corporation is liable to the same extent and under the same circumstances, as a natural person, for the consequences of its wrongful acts, and will be held to respond, in a civil action, at the suit of an injured party, for every wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transaction may be. In such cases, the doctrine of *ultra vires* has no application."

This application, as we have seen, is too sweeping. The Supreme Court of Missouri, while observing the same rule in all state cases, has narrowed its application in national bank cases adhering to the federal rule.⁶⁸

(d, 5.) "No illegal act of an individual," says the Supreme Court of Massachusetts, speaking through Justice Lord, "is as really *ultra vires* as the unauthorized act of a corporation."⁶⁹ Consequently, a bank that purchases a negotiable note from the endorser can maintain an action thereon against a prior party without regard to the question whether the purchase was authorized by law or not. As the transfer has been actually made, and there is no question concerning the validity of the original contract, it can be enforced.⁷⁰

67 20 Wash. 618, 622, citing many cases. "Where the officers of a corporation make a contract with third parties in regard to matters apparently within their corporate powers, but which, upon the proof of extrinsic facts (of which such parties had no notice) lies beyond their power, the corporation must be held, unless it may avoid liability by taking timely steps to prevent loss or damages to such third parties; for in such cases the third party is innocent, and the corporation or stockholders less innocent for having selected officers not worthy of the trust reposed in them." *Lucas v. Transfer Co.*, 70 Iowa 542.

68 *First Nat. Bank v. American Nat. Bank*, 173 Mo. 153.

69 *National Pemberton Bank v. Porter*, 125 Mass. 333.

70 *Ibid.* See *Little v. Obrien*, 9 Mass. 423, and *Neilsville Bank v. Tuthill*, 4 Dak. 295.

(e.) While these rules apply between a corporate bank and those immediately contracting with it, they do not always apply between a bank and its creditors.⁷¹ It is maintained that ultra vires may be employed in their interest, though it cannot be between the immediate parties. Creditors are thus regarded as standing on higher ground because they are not participants in the wrong-doing. But their superior rights are not everywhere acknowledged, and perhaps the only rule that can be deduced from the cases is that the courts are still somewhat uncertain whether to favor them to this extent or not. Courts are moved by a strong sense of justice in dealing with these matters, but in exercising justice it is not always apparent why contracts should be abrogated on this ground in the interest of creditors.

(f.) A contract is presumed to be based on adequate authority until the contrary is shown.⁷²

20. Authority to Transfer Paper. Re-discounting.

A national ⁷³ or state bank ⁷⁴ has authority to transfer its paper.⁷⁵ Once its authority to do this was restricted in some states to the transfer of paper overdue.⁷⁶ The modern rule

⁷¹ Bell v. Ky. Glass Works Co., 106 Ky. 7.

⁷² Rider Life Raft Co. v. Roach, 97 N. Y. 378.

⁷³ People's Bank v. National Bank, 101 U. S. 181; Commercial Nat. Bank v. Pirie, 49 U. S. App. 596, 601; United States Nat. Bank v. First Nat. Bank, 49 U. S. App. 67; Bowen v. Needles Nat. Bank, 36 C. C. A. 553; Thomas v. City Nat. Bank, 40 Neb. 501.

⁷⁴ Bank v. Patchin Bank, 13 N. Y. 309; Farmers' & Mech. Bank v. Parker, 37 N. Y. 148; Robb v. Ross Co. Bank, 41 Barb. (N. Y.) 586; Crocket v. Young, 1 Sm. & M. (Miss.) 241; Smith v. Lawson, 18 W. Va. 212, 227; Cooper v. Curtis, 30 Me. 488; Planters' Bank v. Sharp, 6 How. (U. S.) 301, 323.

⁷⁵ See Chap. IX, §22. A bank in response to B's request for some good paper with A's endorsement sent to B bank for discount and returns a note payable at the A bank to the order of third parties endorsed by them in blank and bearing A's guaranty of payment. The transaction was treated as paper rediscounted by the bank, although no record had been made on the bank's books except to credit the maker of the note with the proceeds. First Nat. Bank v. Stone, 106 Mich. 367.

⁷⁶ Wade v. Thrasher, 10 Sm. & M. (Miss.) 358; Marvine v. Hymers, 12 N. Y. 223.

has been broadened, and any managing officer, whatever may be his technical position, president, vice-president or cashier, can perform this duty. Many of the older decisions on this subject no longer embody the existing law.

In exercising this authority it must be clearly understood that a bank is not primarily employing its own credit.⁷⁷ If it should take a note with a view of adding wings by its endorsement, this would be a plain evasion of the law,⁷⁸ though it may not be easy to distinguish between such a note and many others. If the truth concerning the taking and negotiation of such a note could be elicited, the distinction would clearly appear.

As a discount is a loan to the borrower, so is a re-discount a loan to the borrowing bank. Nevertheless, the latter transaction is just as clearly a sale as a loan. A bank by discounting a piece of paper has become the owner; in re-discounting it the bank parts with its title, effects a sale and usually nothing more. It is true that the bank in re-discounting adds its endorsement, and if the paper is taken essentially on the strength of the security thus added the transaction may be regarded as a loan.

Such a transaction may be easily distinguished from the ordinary transfer of paper in the borrowing bank's possession. Of this it is not the owner, only an agent to collect the proceeds; and its endorsement usually is made to facilitate the business, and not to exercise ownership or control. When a note is taken essentially on the faith of the endorsing bank, is not this a guaranty prohibited by the national law? It is certainly very near the line.

A bank, therefore, can re-discount paper, though in so doing it doubtless nears the verge of the law, especially when the lender takes the paper on the faith of the endorsement of the

⁷⁷ *Bank v. Patchin Bank*, 13 N. Y. 309; *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. (N. Y.) 23.

⁷⁸ *National Bank v. Atkinson*, 55 Fed. 465; *Bowen v. Needles Nat. Bank*, 36 C. C. A. 553; *National Bank v. First Nat. Bank*, 10 C. C. A. 87. See §25.

re-discounting bank rather than on the faith of prior parties.⁷⁹

A bank that re-discounts notes has no claim against the first discounting bank that endorsed them if they are paid at maturity.⁸⁰ It cannot include them on the failure of the first bank with other unpaid notes and demand a dividend on the entire amount. Of course it is entitled to a dividend on the re-discounted notes thus endorsed that were not paid.⁸¹

21. Authority to Lend for Another.

Whether a bank can act as an agent in lending or investing for another bank or individual has not always secured uniform answer. The better opinion is, this service is not beyond the authority of a state bank,⁸² but transcends the limits of a national banking association.⁸³ And a banker who promises his customers to exercise "careful attention" in transacting their business must exercise proper skill in lending their money, even though he perform the service gratuitously.⁸⁴ Furthermore, the presumption is that the cashier or other officer doing the business is acting as agent for the bank, rather than for the investor.⁸⁵

On some occasions a bank officer has loaned a deposit with-

⁷⁹ *Auten v. United States Nat. Bank*, 174 U. S. 125; *United States Nat. Bank v. First Nat. Bank*, 24 C. C. A. 597.

⁸⁰ *Oyster v. Short*, 177 Pa. 601.

⁸¹ *Ibid.*

⁸² *Squires v. First Nat. Bank*, 59 Ill. App. 134; *Wykoff v. Irvine*, 6 Minn. 496; *Bank v. Western Bank*, 13 Bush (Ky.) 526; *Bobb v. Savings Bank*, 64 S. W. (Ky.) 494; *New Hope & Del. Bridge Co. v. Phoenix Bank*, 3 N. Y. 156; *Watson v. Fagner*, 208 Ill. 136.

"It is no part of the business of a bank to loan money for the public or for individuals." *Maltbie, P. J., City Nat. Bank v. Martin*, 70 Tex. 643, 647.

⁸³ *Grow v. Cockrill*, 63 Ark. 418. See cases in the next note.

⁸⁴ *Isham v. Post*, 141 N. Y. 100; *Watson v. Roth*, 191 Ill. 382; *Watson v. Fagner*, 208 Ill. 136. Though a national bank may not have power to sell notes as an agent for the owner, it is liable to him for purchasing and converting them to its own use. *First Nat. Bank v. Anderson*, 172 U. S. 573.

⁸⁵ *Christie v. Sherwood*, 113 Cal. 526. Often this is a question of fact *First Nat. Bank v. Anderson*, 5 Indian Terr. 118.

out authority from the depositor. Of course he is not bound by such action without ratification, which is not effective without a full knowledge of all the essential facts.⁸⁶

(a.) In lending for an individual or bank, what care must the agent exercise in accepting collateral? If the agent is told to accept bonds that are described, must there be an examination of the package first to make sure of the requisite number and afterward of their genuineness? The rule to apply, so the court has said in a well considered case, is: "The exercise of such reasonable diligence as the ordinarily prudent man would apply in the transaction of the particular business. [And] the question, what is such ordinary care, must always be determined by evidence of the usual manner of doing that business by men who are accustomed to it."⁸⁷ Therefore an agent who takes the bonds requested as security and merely looks at the backs without opening them, fulfils his duty wherever this is the practice or mode of doing business. The practice may indeed seem hasty, but wherever it prevails the business is done largely on the confidence reposed in customers, which is happily on rare occasions only betrayed. Loose as this rule may be, surely the action of a bank is indefensible that neglects after agreeing to make a loan on real estate security, to take any, or security that is manifestly inadequate.⁸⁸

22. Authority of Bank to Borrow.

A bank can borrow money, even by oral agreement,⁸⁹ needed for the successful prosecution of its business. As it is a dan-

86 *Valley Bank v. Brown*, 83 Pac. (Ariz.) 362. See §32 and Chap. XII. §14f.

87 *Clinton Nat. Bank v. National Park Bank*, 37 N. Y. App. 601, 607, affd. 165 N. Y. 629, citing *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215; *Leach v. Beardslee*, 22 Conn. 404; *Maynard v. Buck*, 100 Mass. 40; *Isham v. Post*, 141 N. Y. 100.

88 *Larsen v. Utah Loan & Trust Co.*, 23 Utah 449.

89 *Hanover Nat. Bank v. First Nat. Bank*, 109 Fed. 421. See Chaps. VIII, §13 and IX, §23. In Kansas authority is given by statute, Laws 1905, Chap. 69.

gerous power, the courts have always sought to guard it from abuse.⁹⁰

23. Restrictions on Bank's Authority to Lend Its Money.

The restrictions on a bank's authority to lend will now be stated. A national bank is forbidden to lend a customer more than ten per cent. of its capital and surplus,⁹¹ though the rule does not prevent lending him a much larger sum on other pa-

90 *Auten v. U. S. Nat. Bank*, 174 U. S. 125; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618; *Donnell v. Lewis Co. Sav. Bank*, 80 Mo. 165; *Ringling v. Kohn*, 6 Mo. App. 333; *Leavitt v. Yates*, 4 Edw. Ch. (N. Y.) 134; *Curtis v. Leavitt*, 15 N. Y. 9, 166; *Barnes v. Ontario Bank*, 19 N. Y. 152, 156; *City Bank v. Perkins*, 4 Bos. (N. Y.) 420; *Coats v. Donnell*, 94 N. Y. 168, 176; *Ward v. Johnson*, 95 Ill. 215; *Ridgway v. Farmers' Bank*, 12 S. & R. (Pa.) 256; *First Nat. Bank v. Arnold*, 156 Ind. 487; *Harris v. Randolph Co. Bank*, 157 Ind. 120; *Rockwell v. Elkhorn Bank*, 13 Wis. 653; *Planters' Bank v. Sharp*, 6 How. (U. S.) 301, 323; *Magee v. Mokelumnee Mining Co.*, 5 Cal. 258; *Bank of Australasia v. Breillat*, 6 Moore P. C. (Eng.) 152, 194. See *Leggett v. N. J. Mfg. Co.*, 1 N. J. Eq. 541.

In an action on a note given by directors of a bank for a loan endorsed by the bank, evidence was admissible to prove the custom of banks in that vicinity to borrow money without special authority of the board of directors. *First Nat. Bank v. Arnold*, 156 Ind. 487, 494; *Hanover Nat. Bank v. First Nat. Bank*, 109 Fed. 421, 424 and cases cited; *Heironimus v. Sweeney*, 83 Md. 146. An officer of a bank without authority borrows money for its use, in its name, pledging its assets for security. The bank is estopped to deny his authority, especially as it had, or ought to have had, knowledge of what he did. *First Nat. Bank v. State Bank*, 107 N. W. (N. Dak.) 61. The president of a national bank discounted his note with a correspondent bank which by agreement placed the proceeds to the credit of the borrowing bank. They were not to be drawn, but held as a special account to meet the note at maturity. The object of the transaction was to deceive the bank examiner. After the failure of the borrowing bank, the note was charged to the special account. The money was held to belong to the pre-tended lender. *Cherry v. City Nat. Bank*, 144 Fed. 587.

91 Rev. Stat. §5200; Stat. at large, 1 Sess. 59 Cong. Chap. 3516 (1906); *Gold-Mining Co. v. National Bank*, 96 U. S. 640; *Stewart v. National Union Bank*, 2 Abb. (U. S.) 424; *Shoemaker v. National Mechanics' Bank*, 2 Abb. 416; *Hanover Nat. Bank v. First Nat. Bank*, 109 Fed. 421, 426; *O'Hare v. Second Nat. Bank*, 77 Pa. 96; *Mills Co. Nat. Bank v. Perry*, 72 Iowa 15; *Portland Nat. Bank v. Scott*, 20 Or. 421; *Corcoran v. Batchelder*, 147 Mass. 541. In Iowa a statute provided that the total liability of a borrower should not exceed twenty per cent. of the bank's capital. The court in construing the statute remarked that it did not make

per he may present endorsed or unendorsed by himself.⁹² Nor can it lend on the security of its own stock.⁹³ State banks contain fewer restrictions, though the tendency is to adopt the same restrictions as are imposed on national banks.⁹⁴

24. Bank May Collect Money it Ought Not to Have Loaned.

While a national bank is thus restricted in lending more than one-tenth of its capital and surplus to a borrower on his own paper, the government only can recognize any violation of the law; an offending bank therefore is not prevented from collecting the entire amount loaned. And a similar state law is construed in the same manner for the opposite construction would defeat the very purpose of the law, the conservation of the bank's capital.⁹⁵

25. Bank Cannot Lend Its Credit.

While a bank can lend its money, it cannot lend its credit ⁹⁶

a loan in excess of that amount void, and that the general rule applicable to loans of that character did not render them void; the prohibition was "intended as a rule for the government of the bank." *Benton Co. Sav. Bank v. Boddicker*, 105 Iowa 548, 558, citing many cases, among them *Farmington Sav. Bank v. Fall*, 71 Me. 49.

⁹² *Second Nat. Bank v. Burt*, 93 N. Y. 233, 244; *McKinley-Lanning Loan & Trust Co.*, 12 Pa. Co. Ct. 40. See *Iron Dollar Sav. Bank*, 12 Pa. Co. Ct. 42. In California by statute banks have been forbidden to borrow money to pay debts due to depositors founded on the belief that "when it could not do this it was time for it to close its doors." *Laidlaw v. Pacific Bank*, 137 Cal. 392, 396.

⁹³ *Bullard v. Bank*, 18 Wall. (U. S.) 589. For more cases see *Bolles' Nat. Bank Act*, p. 74.

⁹⁴ See *Bank of Martinez v. Hemme Orchard & Land Co.*, 105 Cal. 376.

⁹⁵ Same cases as in §23, note 1. *Maryland Trust Co. v. National Mech. Bank*, 63 At. (Md.) 70.

Murray Nelson & Co. v. Leiter, 190 Ill. 414. In Missouri the legal amount of a loan can be collected. *McClintock v. Central Bank*, 120 Mo. 127.

⁹⁶ *National Park Bank v. German American Security Co.*, 116 N. Y. 281; *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. (N. Y.) 23; *Bridgeport City Bank v. Empire Stone Dressing Co.*, 30 Barb. 421; *Farmers' & Mech. Bank v. Empire Stone Dressing Co.*, 5 Bos. (N. Y.) 275; *Morford v. Farmers' Bank*, 26 Barb. 568; *Bank v. Patchin Bank*, 13 N. Y. 309; *Aetna Nat. Bank v. Charter Oak Ins. Co.*, 50 Conn. 167; *Monument*

by any form of endorsement, or guaranty,⁹⁷ for the principal benefit of another. The rule is very broad, applying to all corporations, except those especially organized for this purpose. "Ordinarily, the simple act of becoming surety or guarantor for the contract or debt of another person or corporation is not within the implied powers of a corporation. The reason for this rule is that such a contract risks the capital and funds of the corporation in an enterprise not contemplated by the stockholders in subscribing for or purchasing its stock, prejudices the rights of its creditors, and exceeds the authority conferred by its charter."⁹⁸

No contract of this nature can be enforced; the bank or the other contracting party is remediless. "The principle, that a corporation which has entered into a contract in excess of its powers and received the fruits or benefits thereof, will not be permitted to set up want of authority, is not applicable."⁹⁹

A bank may indeed endorse, guarantee or in other ways transfer notes and other obligations that it may own, or seek to collect for others; but in thus using its name its prime object

Nat. Bank v. Globe Works, 101 Mass. 57; Davis v. Old Colony R., 131 Mass. 258; Culver v. Reno Real Estate Co., 91 Pa. 367; Hall v. Auburn Turnpike Co., 27 Cal. 255.

97 Bowen v. Needles Nat. Bank, 36 C. C. A. 553; Commercial Nat. Bank v. Pirie, 27 C. C. A. 171; Farmers' & Merch. Nat. Bank v. Smith, 23 C. C. A. 80; National Bank v. First Nat. Bank, 27 U. S. App. 88; People's Bank v. National Bank, 101 U. S. 181; National Bank v. Atkinson, 55 Fed. 465; Flannagan v. California Nat. Bank, 56 Fed. 959; Seligman v. Charlottesville Nat. Bank, 3 Hughes (U. S.) 647; Johnston Brothers v. Charlottesville Nat. Bank, 3 Hughes 657; Blair v. First Nat. Bank, 2 Flippin (U. S.) 111; Norton v. Derry Nat. Bank, 61 N. H. 589; Stark Bank v. United States Pottery Co., 34 Vt. 144; National Bank v. Sixth National Bank, 212 Pa. 238; Thomas v. City Nat. Bank, 40 Neb. 501; Houghton v. First Nat. Bank, 26 Wis. 663; Thilmany v. Iowa Paper Bag Co., 108 Iowa 333; Groos v. Brewster, 55 S. W. (Tex. Civ. App.) 590; Bacon v. Farmers' Bank, 79 Mo. App. 406; First Nat. Bank v. American Nat. Bank, 173 Mo. 153. A national bank cannot guarantee bonds it does not own; but it may agree to purchase them at the same price on demand. First Nat. Bank v. Schaeffer, 16 Ohio C. C. 457.

Contra.—Hutchins v. Bank, 128 N. C. 72.

98 Monarch Co. v. Farmers & Drovers' Bank, 105 Ky. 430, 437.

99 Sturdevant v. Farmers' & Merch. Bank, 62 Neb. 472, 477.

is to transfer these instruments, and not to add to their value by lending or parting with its own credit. The law, while giving the fullest authority to do the one thing, forbids the other.¹

A bank is sometimes required to guarantee deposits, especially those of public officers. In many cases it is a statutory requirement. How are such bonds construed and applied?² In one of the cases the guarantors were to "account for, and pay over all moneys now on deposit in [the bank mentioned] or due or to become due therefrom to the people." This was regarded as a continuing obligation whereby the guarantors were liable for the entire balance due from the bank to the state at the beginning of the year, as well as for subsequent deposits.² In another case in which a new bond was given, it was regarded as a substitute for the old one, and the guarantors were thereby held up for deposits made during the existence of the other.³

A contract by a national bank to indemnify one for loss incurred as surety on an attachment bond is not void, though the bond was not given for the benefit of the bank. Said the court: "So far as neither party has executed the contract, it is entirely consistent with public policy to avoid it. But where the other party has executed the contract, . . . the repudia-

1 This restriction applies to national banks. See cases in note 2; *Farmers' & Mech. Bank v. Butchers' & Drov. Bank*, 16 N. Y. 125, and cases in note 1. *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa 333; *Chase v. Swift & Co.*, 84 N. W. 86; *State Nat. Bank v. Newton Nat. Bank*, 14 C. C. A. 61; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557. See Kan. Laws, 1905, Chap. 69. This prohibition includes an undertaking as surety in legal proceedings wherein the bank has no interest. *Sturdevant v. Farmers' & Merch. Bank*, 62 Neb. 472. A bank guaranteed the payment of several notes and their renewals at the time of transferring them to another bank. The transferee afterward surrendered one of the notes to the maker, receiving a substitute in return. The guarantor was discharged from liability on the note thus surrendered. *First Nat. Bank v. Bradley*, 61 Kan. 615.

2 *People v. Lee*, 104 N. Y. 441. A sued as treasurer of B county to recover from a banker deposits secured by an indemnity bond. It was contended that it was contrary to public policy for the treasurer to transfer the fund from his own keeping and take a bond therefor. The court ruled otherwise. *Weddington v. Jones*, 91 S. W. (Tex.) 818.

3 *Erie Co. Sav. Bank v. Coit*, 104 N. Y. 532.

tion of it by the corporation is inconsistent with that honesty which is the highest public policy. In such a case the contract should be enforced."⁴

A bank can borrow money to lend again. And if this be done by agreement that the bank is to have the margin of profit between an agreed rate and that obtained by the bank, and lends the money to persons who were known to be insolvent, it will be liable to the lender.⁵

A bank officer who borrows on the credit of his bank money from another bank, for a company of which he is a leading officer, without informing his bank directory, and in such a way as to conceal the transaction as much as possible from them, commits a fraud. As the terms of the loan clearly reveal its fraudulent character, the lending bank is also a participant and cannot recover the loan. Furthermore, as he is acting adversely to the interests of his bank, his knowledge of the transaction cannot be imputed to it.⁶

26. Bank's Responsibility for Collaterals.

(a.) A bank that receives collaterals for loans must keep them safely and return them in accordance with the terms of the pledge.⁷ Nor is a time-note thus secured with a pledge that,

4 Seeber v. Commercial Nat. Bank, 77 Fed. 957, 960. See Chap. IX, §28, and Sturdevant v. Farmers' & Merch. Bank, 62 Neb. 472, ante note 1. A contract was made with a bank to indemnify it for furnishing sureties on a bond, and money was deposited with it to secure the president and cashier who served as sureties. The money was deposited to their credit and used by them, and the bank was responsible therefor. Merchants' Nat. Bank v. Phillip & Wiggs Mach. Co., 15 Tex. Civ. App. 159.

5 Deposit Bank v. Fleming, 19 Ky. L. Rep. 1947. A loan entered on the books of a bank on which interest is paid creates the presumption that the directors knew and approved of the transaction. Ibid.

6 Fort Dearborn Nat. Bank v. Seymour, 71 Minn. 81.

7 See Chap. XIII, §16. A lending bank returned the collaterals it held to secure a note for the borrower to collect as they became due. He returned the money to the bank to be applied on his note. When he had sent almost enough to pay it, the bank transferred the note to another bank which had no knowledge of the payments, as they had not been endorsed on the note. The purchaser sought to have a trust established on the moneys thus paid, but did not succeed. Furthermore, the note was re-

in the event of their depreciation, the pledgor shall pay part of the debt, converted into a call loan by the declining worth of the collaterals.⁸ Moreover, if they are endorsed in blank, and the bank abuses its trust, transferring them to another who is innocent, he acquires a good title thereto.⁹ But a pledgee to whom a certificate is endorsed in blank with the right to *sell*, if necessary to reimburse himself, has no right to *re-pledge* it; consequently, the new pledgee acquires no right thereto, for the

garded as paid to the extent of such payments, the court declaring that the fraud in selling the note cannot destroy the effect of the payments already made, or change their character, and they will continue to be payments, whether the moneys so paid can be traced and followed into the funds in the hands of the receiver or not. *Merchants' Nat. Bank v. Allemania Bank*, 71 Minn. 477, 480. A note was deposited by the payees with a bank as collateral, and also the proceeds of a second note given in renewal of the first, though without the bank's knowledge. Nevertheless the makers were liable on the first note. *National Bank v. Kenney*, 83 S. W. (Tex.) 368. The fact that a bank made a contract to receive and collect securities and remit the proceeds for the owner, with other provisions that are illegal, does not relieve the bank of the obligation to return the securities or account for their value. *Emmerling v. First Nat. Bank*, 38 C. C. A. 399.

A cashier pledged notes as collateral to his bank and afterward pledged the same notes to a director to whom he was indebted. The latter was not regarded as an innocent purchaser without positive evidence that he knew nothing about the original pledge of the notes to the bank. *Major v. Stone's River Nat. Bank*, 64 S. W. (Tenn.) 352. The widow of the cashier paid the director's debt and claimed the collaterals. The business was done by an agent, a director of the bank, who knew that the notes had previously been pledged to the bank. She was bound by his knowledge and could not recover them from the bank. *Ibid*.

8 *Dimock v. United States Nat. Bank*, 55 N. J. Law 296.

9 *Brittan v. Oakland Bank*, 124 Cal. 282; *Otis v. Gardner*, 105 Ill. 436; *Keim v. Vette*, 67 Mo. 389. A bank that obtains from its cashier a certificate of stock endorsed in blank by the owner and left with the cashier as security for a loan, acquires a good title thereto against the owner. *Brady v. Mt. Morris Bank*, 65 App. Div. 212; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325. Even though the cashier had no authority to pledge the certificate for his loan, this could not be imputed to the bank, for he was acting in the matter for himself. *Ibid*: *Seneca Co. Bank v. Neass*, 5 Denio (N. Y.) 329. A blank endorsement of a non-negotiable certificate of deposit by the payee accompanied by delivery will enable the holder to make a valid pledge of the certificate to an innocent party without reference to the equities between himself and the payee. *International Bank v. German Bank*, 71 Mo. 183; *Bank of Commerce v. Genocchio*, 27 Mo. App. 661, 666.

form of the original pledge should put him on inquiry.¹⁰ Nor can the original contract be destroyed by any usage, authorizing the pledgee to re-pledge the stock.¹¹ Still weaker, if possible, is the defence in such a transaction after the original loan has been fully repaid, though the security remains in the original pledgee's possession.¹²

(b.) Again, a bank has no right to transfer collateral to its name before maturity of the debt, and the intended act may be prevented by injunction;¹³ but the needful entry to protect its interest is fully justified.¹⁴

(c.) The pledgee bank has the right to retain the property pledged until payment of the debt, even if it is barred by the statute of limitations.¹⁵ And when no agreement has been made with regard to the application of the proceeds derived from the sale or collection of the pledged property, the bank may apply them to any part of the debt.¹⁶

(d.) The bank must use due diligence in collecting the collateral, and is liable for the consequences of not observing the rule. In protecting and collecting the collateral the bank is en-

10 *German Sav. Bank v. Renshaw*, 78 Md. 475; *First Nat. Bank v. Taliaferro*, 72 Md. 171.

11 *Ibid.*

12 *Lawrence v. Maxwell*, 53 N. Y. 19, 23.

13 *Spreckels v. Nevada Bank*, 113 Cal. 272; *Ayer v. Seymour*, 5 N. Y. Supp. 650; *McHenry v. Jewett*, 90 N. Y. 58; *State v. Smith*, 15 Or. 98.

14 *Spreckels v. Nevada Bank*, 113 Cal. 272.

15 *Commercial Sav. Bank v. Hornberger*, 140 Cal. 16; *Whitmore v. San Francisco Sav. Union*, 50 Cal. 145, 150; *Spect v. Spect*, 88 Cal. 437; *Zellerback v. Allenberg*, 99 Cal. 57, 69; *Grant v. Burr*, 54 Cal. 300; *Hamilton v. Glen*, 85 Va. 901; *Omaha Sav. Bank v. Suneral*, 61 Neb. 741; *Chouteau v. Allen*, 70 Mo. 290, 341; *Hudson v. Wilkinson*, 61 Tex. 606; *Gage v. Riverside Trust Co.*, 86 Fed. 984, 998; *Spears v. Hartly*, 3 Esp. (Eng.) 81; *Colebrooke on Coll. Securities*, §101; *Jones on Mortgages*, §581.

But in Illinois the right to hold the pledged property is also barred by statute. *Rev. Stat. sec. 16, Chap. 83. Pollock v. Maison*, 41 Ill. 516; *March v. Mayers*, 85 Ill. 177; *Emory v. Keighan*, 88 Ill. 482; *Jones v. Lander*, 21 Ill. App. 510.

16 *Cox v. Sloan*, 158 Mo. 411. See Chap. XXV. §7. Collateral security pledged to a bank by a husband and wife does not give the bank a lien to secure an individual note of the husband. *First Nat. Bank v. Southworth*, 74 N. E. (Ill.) 771.

titled to receive all reasonable cost and expense, like any other trustee.¹⁷ Thus the bank is liable for neglect in presenting a note and not notifying an endorser whereby he is discharged, or in failing to execute any special agreement to the detriment of the pledgor or other parties.¹⁸ And if collaterals are not applied in fulfilment of an agreement, the sureties thereon are relieved to the extent of their misapplication.¹⁹

On the other hand, the pledgee, by observing this rule of diligence, holds the pledgor to his liability notwithstanding its failure to collect the collateral.²⁰ Nor are the rights of the pledgee lost by an imperfect compliance with the law in selling the stock. The purchaser then becomes the transferee of the pledge with the rights enjoyed by the original pledgee until the obligation he primarily incurred is extinguished.²¹

17 *Lumber Co. v. Pollock*, 139 N. C. 174, 175; *Griggs v. Howe*, 42 N. Y. 166, 173; *Starrett v. Barber*, 20 Mo. 457; *Gregory v. Pike*, 67 Fed. 837; *Hurst v. Coley*, 22 Fed. 183. *Colebrooke on Coll. Securities*, §§90, 111, 114. See valuable note, 68 Am. St. Rep. 542.

18 *Scott v. First Nat. Bank*, 5 Indian Terr. 292; also 2 *Randolph on Com. Paper*, §804.

19 *Brown v. First Nat. Bank*, 50 C. C. A. 602.

20 *Scott v. First National Bank*, 5 Indian Terr. 292, containing an elaborate review of cases. *Roberts v. Farmers' Bank*, 80 S. W. (Ky.) 441; *Beale v. Bank*, 5 Watts (Pa.) 529; *Miller v. Gettysburg Bank*, 8 Watts (Pa.) 192; *Lyon v. Huntingdon Bank*, 12 Serg. & R. (Pa.) 61, 67; *Hanna v. Holton*, 78 Pa. 334; *Bank v. Peabody*, 20 Pa. 454; *Smith v. Miller*, 43 N. Y. 171; *Wheeler v. Newbould*, 16 N. Y. 392; *Lamberton v. Windom*, 12 Minn. 232; *Bridge Co. v. Savings Bank*, 46 Ohio St. 224; *Third Nat. Bank v. Harrison*, 10 Fed. 243. See notes 31 Am. Dec. 451 and 32 Am. St. Rep. 718.

If a pledged note is made payable at a bank the pledgee's duty is properly performed in sending it to the bank at the proper time for payment, unless it has reason to doubt the bank's solvency. *Bridge Co. v. Savings Bank*, 46 Ohio 224. And the same rule should be applied when the pledged note falls due before the principal debt. *Ibid.* A bank holding an assigned, guaranteed note is under no legal obligation to protect from loss the guarantors by first resorting to the pledged property as security which is not in its custody. *Blanding v. Wilsey*, 107 Iowa 46; *Fuller v. Tomlinson*, 58 Iowa 111. The true remedy of the guarantors is to pay the debt and enforce the guaranty. *Ibid.*

21 *Brittan v. Oakland Bank*, 124 Cal. 282. And if the bank makes a guaranty for example, that the cattle pledged are free from disease, it may be held thereon. *State Bank v. Dody*, 79 Pac. (Kan.) 1092.

Again, similar care and diligence must be exercised in collecting the collateral should it mature before the debt thus secured is paid.²² It is said that "such cases are not governed by the strict rules of commercial law applicable to negotiable paper."²³

(e.) Lastly, the pledgor subject to the rights of the pledgee and without notice to him, can pledge the same property to secure other indebtedness.²⁴ And if the pledgee, having notice of the transfer, ignores or disregards the rights of the trans-

22 *Bridge Co. v. Savings Bank*, 46 Ohio St. 224; *Miller v. Gettysburg Bank*, 8 Watts. (Pa.) 192.

23 *Ibid*; *Roberts v. Thompson*, 14 Ohio St. 1; *Lawrence v. McCalmont*, 2 How. (U. S.) 426; *Noland v. Clark*, 10 B. Mon. (Ky.) 239.

24 *Hughes v. Settle*, 36 S. W. (Tenn.) 577. The agent of an undisclosed principal (who is president of a bank) receives notice that collaterals held by him have, subject to the pledge of them to the bank, been transferred as collaterals to another loan for a second loan. The agent surrenders the bonds to the pledgor who, at the agent's request, sells them and from the proceeds pays the bank. The bank is liable for the money to the second pledgee, it having had knowledge through the president how the money was obtained. *Ibid*. A, desirous of purchasing some pledged goods, was required by the pledgee to deposit the purchase price in a bank. Accordingly A deposited a draft to the pledgee's credit drawn on another bank for the amount. The officer of the bank knew the purpose for which the draft was deposited, but no special instructions were given concerning the funds. The draft was collected, but the first bank failed before the money was paid to the pledgee. The deposit was held to be a general one, like those of the creditors. *Schofield Mfg. Co. v. Cochran*, 119 Ga. 901. The purchaser paid the pledgee and was subrogated to his rights, but had no priority over the other creditors. See *Tiedeman v. Imperial Fertilizer Co.*, 109 Ga. 661; *Ober v. Cochran*, 118 Ga. 396.

A cashier who had pledged collateral to his bank to secure a loan pledged the same collateral to a director to secure him without the bank's knowledge. Nevertheless, the director was presumed to have knowledge of the first loan, which could be overcome only by positive knowledge to the contrary. *Major v. Stone's River Nat. Bank*, 64 S. W. (Tenn. Ch. App.) 352. A company, some of whose shares were pledged, was organized with the consent of the pledgor and pledgee. Before the new stock was issued to the debtor, he assigned a part of it to a third, with the pledgee's knowledge, but without his consent. The assignment was not effective as against the pledgee. *Dexter Horton & Co. v. McCafferty*, 84 Pac. (Wash.) 733.

ferree, and brings to him loss, the pledgee will be liable therefor.²⁵

27. Bank's Duty to Collect Collaterals.

(a.) The pledgee can sell ordinary personal security "like goods, chattels, stocks, and public securities," for the fair presumption is that they were expected to be sold publicly, after demand and due notice, on non-payment of the obligation for which they were pledged.²⁶ But the pledgee cannot directly or indirectly sell the collateral to himself; should he do so, no title would be acquired, and the security would still be held as if there had been no sale.²⁷ The surplus, if any there be, must be delivered to the pledgor.²⁸ Again, directors who seek to depress collateral in order to buy it at a lower price commit a wrong for which the pledgor has a remedy against them.²⁹

(b.) The pledgee of commercial paper must hold, collect, and apply the proceeds at the maturity of the principal debt in payment of it.³⁰ With respect to dividends, the pledgee ordinarily has the right to collect them, and account therefor to the pledgor.³¹ But if he should assign the stock and collect the dividends afterward, the pledgee cannot hold the assignee for them.³²

25 *Hughes v. Settle*, 36 S. W. (Tenn.) 577, 580.

26 *Morris Canal & Bkg. Co. v. Lewis*, 12 N. J. Eq. 323; *Fletcher v. Dickinson*, 7 Allen (Mass.) 23; *Reynolds v. Simpson*, 86 Ga. 454; *Brown v. Ward*, 3 Duer (N. Y.) 660; *Little v. Barker*, 1 Hoff. Ch. (N. Y.) 488; *Tucker v. Wilson*, 1 P. Wm. (Eng.) 260.

27 *Middlesex Bank v. Minot*, 4 Met. (Mass.) 325; *Register v. Sellers*, 4 Pa. Co. Ct. 490, and cases in next note. See *Greenfield Sav. Bank v. Simons*, 133 Mass. 415 and *Mechem on Agency*, §401.

28 *Handy v. Sibley*, 46 Ohio St. 9; *Fisher v. Fisher*, 98 Mass. 303; *Stoddard v. Kimball*, 6 Cush. (Mass.) 469; *Duncan, Sherman & Co. v. Gilbert*, 29 N. J. Law 527; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, and cases cited.

29 *Ritchie v. McMullen*, 79 Fed. 522.

30 *Handy v. Sibley*, 46 Ohio St. 9; *Lumber Co. v. Pollock*, 139 N. C. 174.

31 *Maxwell v. National Bank*, 70 S. C. 532.

32 *Ibid.*

(c.) Commercial paper cannot be sold without special authority.³² The reason is that such paper, "not being marketable at its fair value, would generally be sold at a sacrifice, and injustice would be done the debtor. Such a result," adds Justice Dickman, "it cannot be presumed was the intention of the parties."³⁴ If the collateral consists of *accommodation* paper, the pledgee can collect of the maker only enough to satisfy the debt; for, if he collected more, he would be obliged to pay the surplus to the pledgor, who, in turn, would be required to refund to the maker.³⁵

(d.) When the pledgee sells collaterals to pay the debt before its maturity, the pledgor may ratify the sale and claim the proceeds; or treat the sale as a conversion and require the pledgee to replace the stock; or replace the stock himself and require the pledgee to make up the loss; or recover the advance in the market price to a reasonable time within which to replace the stock after notice of sale; or he may hold the pledgee for a breach of his duty to keep the security until the maturity of the debt and recover as damages the value at that time of the security.³⁶

28. Loans to Corporation.

A bank that discounts notes for a corporation-depositor is not required to know that the proceeds will be applied to its uses. So long as the bank is not in collusion with the agent or manager of the corporation, the bank must honor his checks

33 *Handy v. Sibley*, 46 Ohio St. 9; *Lumber Co. v. Pollock*, 139 N. C. 174.

34 *Ibid*; *Wheeler v. Newbould*, 16 N. Y. 392; *Nelson v. Wellington*, 5 Bos. (N. Y.) 178; *Brown v. Ward*, 3 Duer (N. Y.) 660; *Fletcher v. Dickinson*, 7 Allen (Mass.) 23; *Morris Canal & Bkg. Co. v. Lewis*, 12 N. J. Eq. 323; *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.*, 82 Ill. 548; *Zimpleman v. Veeder*, 98 Ill. 613.

Contra.—*Anderson v. First Nat. Bank*, 5 N. Dak. 451 and 4 N. Dak. 182.

35 *Atlas Bank v. Doyle*, 9 R. I. 76; *Chicopee Bank v. Chapin*, 8 Met. (Mass.) 40; *Jones v. Hibbert*, 2 Starkie (Eng.) 304; *Wiffen v. Roberts*, 1 Esp. (Eng.) 261.

36 *Dimock v. United States Nat. Bank*, 55 N. J. Law 296; 1 Cook on Corp. §§ 469, 471.

drawn in due course of business.³⁷ And the note of a company, though made without authority, yet discounted in good faith, must be paid by the company, provided the proceeds have been applied to pay its debts.³⁸

37 *First Nat. Bank v. G. V. B. Mining Co.*, 89 Fed. 439, 445.

38 *Bridgewater Cheese Factory v. Murphy*, 23 Ont. Appeal (Can.) 66. A bank held as collateral security bonds for a loan made to A, who was the treasurer of the company that issued the bonds, and also the company that acted as trustee for the stockholders. The bank's knowledge of the offices he filled did not charge it with knowledge that he held the bonds he had pledged in a fiduciary capacity, or had obtained them by fraud. *Rochester Nat. Bank v. Citizens' Gas Light Co.*, 72 Conn. 577. The directors are estopped to deny the authority of a cashier and assistant cashier to extend credit to a speculative corporation of which they were members after a period of dealing for five years without objection. *First Nat. Bank v. Gaddis*, 31 Wash. 596; *Roberts v. Washington Nat. Bank*, 11 Wash. 550. A promise of a bank officer to pay money loaned to an insolvent corporation is within the statute of frauds, and not binding. *Ibid.* A by-law of a corporation requiring all its notes to be countersigned in a particular manner does not affect the validity of a note not thus executed, which is taken by the payee without any knowledge of the by-law. *Lyndon Sav. Bank v. International Co.*, 75 Vt. 224. The officers of a corporation borrowed money of a bank for the purpose of paying its creditors, leaving it on deposit to the credit of their company with the lender. It was afterward drawn out to pay the loan. At the time of doing this the company was insolvent, but the bank had no knowledge of its condition. After the company's failure, the receiver sued the bank for the deposit, claiming that it was a trust deposit, which the bank had no right to divert, but failed in the contention. *Wyman v. National Bank*, 51 Neb. 636. A note representing a just debt made by one corporation in favor of another is not invalid merely because the two corporations have common directors. *Evansville Public Hall Co. v. Bank of Commerce*, 144 Ind. 34. A note was endorsed by one who had no authority to do so, and whose action was unknown by the company at the time it received the money thereon. It was not thereby prevented from denying his authority, repudiating the endorsement, and relieving itself from liability. *Wickersham Banking Co. v. Nicholas*, 82 Pac. (Cal.) 1124.

A company made a note payable to the order of B Company, delivered it to B's treasurer, who endorsed the payee's name in blank, his own as treasurer, and then presented it for discount at the Windham bank. Shortly afterwards he appropriated the proceeds and fled. The question was to whom should A pay, whether B or the bank. The lower court decided that the treasurer had no authority to endorse it, that the bank had enough knowledge to put it on inquiry and was therefore negligent in not making inquiry. The court of review thought otherwise and the bank was entitled to payment. *Standard Cement Co. v. Windham Nat. Bank*, 71 Conn. 668.

29. Loans to Partnership.

A bank must exercise proper care in discounting notes of a partnership to prevent the misuse of its credit. Thus a bank cannot discount the note of a partnership presented by a partner and apply the avails to pay his individual debt. But a partnership is liable for money actually borrowed by a partner on the credit of his firm in the course of its business, though it was misapplied by the borrower.³⁹ In like manner if money is borrowed by a partner, not expressly on his individual credit, but partly on that of his partnership, which has the use of the money, the partners are liable therefor.⁴⁰

30. Loans by Savings Bank.

A savings bank is bound by more rigid rules than a bank of discount in lending, because its deposits are regarded as possessing a peculiarly fiduciary character. In many, if not all states, savings banks are required to lend a considerable portion of their resources on the security of real estate; they are also rigidly restricted in their purchases of bonds and stocks: yet if loans are made without proper authority, they can recover the money.⁴¹ *Ultra vires* can no longer be used by the borrower to escape payment.⁴²

39 *Eyrich v. Capital State Bank*, 67 Miss. 60; *Onondaga Co. Bank v. De Puy*, 17 Wend. (N. Y.) 47; *Waldo Bank v. Lumbert*, 16 Me. 416; *Winship v. Bank of United States*, 5 Pet. (U. S.) 529.

40 *Church v. Sparrow*, 5 Wend. (N. Y.) 223; *Whittaker v. Brown*, 16 Wend. 505; *Miller v. Manice*, 6 Hill (N. Y.) 114. A partner who signs a note with his individual name and beneath, that of his partnership, does not thereby sufficiently notify the discounting that the firm is a surety merely instead of a joint principal. *Warren Deposit Bank v. Younglove*, 112 Ky. 767. See further on loans to a partnership, 1 *Parsons on Contracts*, 8th Ed. 201.

41 *Farmington Sav. Bank v. Fall*, 71 Me. 49; *United German Bank v. Katz*, 57 Md. 128; *Pratt v. Short*, 79 N. Y. 437; *Auburn Sav. Bank v. Brinkerhoff*, 44 Hun (N. Y.) 142; *Pratt v. Eaton*, 79 N. Y. 449.

Contra.—In *re Jaycox*, 12 Blatchf. (U. S.) 209.

42 See §19. A savings bank cannot make a contract to attend a public sale for the purpose of keeping an account of sales and taking notes from purchasers with approved security. *Willett v. Farmers' Sav. Bank*, 107 Iowa 69.

The tendency is, from lack of the highest kind of security except at prices yielding an extremely low rate of interest, to give greater latitude to savings banks in lending their money. In some states they can now discount ⁴³ and purchase ⁴⁴ negotiable paper, city warrants,⁴⁵ and bonds of various kinds,⁴⁶ lend on call ⁴⁷ and in other ways.

Savings banks have often been forbidden from lending on personal security, and questions have arisen whether this prohibition included loans that were otherwise secured. Generally a loan of this character secured by additional collateral has not been deemed a legal violation.⁴⁸

Some other limitations may be mentioned. A savings bank cannot subscribe for the stock of a corporation,⁴⁹ especially if having no money at the time to pay therefor;⁵⁰ or purchase bonds and other securities of doubtful worth from one of its trustees;⁵¹ or invest in mortgages unless the security is worth as much more free from every encumbrance;⁵² or loan on notes

43 *Duncan v. Maryland Sav. Institution*, 10 Gill & J. (Md.) 299; *Rome Sav. Bank v. Kramer*, 32 Hun (N. Y.) 270; *Auburn Sav. Bank v. Brinkerhoff*, 40 Hun (N. Y.) 142.

44 *Pape v. Capitol Bank*, 20 Kan. 440; *McClain's Code*, (Iowa) Sec. 1796; *Urbinga v. Farmers' Sav. Bank*, 108 Iowa 221; *Laidlaw v. Pacific Bank*, 137 Cal. 392.

45 *Aull Sav. Bank v. City of Lexington*, 74 Mo. 104.

46 *Duncan v. Maryland Institution*, 10 Gill & J. (Md.) 299; *Tishimingo Sav. Institution v. Buchanan*, 60 Miss. 496; *Mott v. U. S. Trust Co.*, 19 Barb. (N. Y.) 568.

47 *Erie Co. Sav. Bank v. Coit*, 104 N. Y. 532.

48 *Mott v. U. S. Trust Co.*, 19 Barb. (N. Y.) 568; *U. S. Trust Co. v. Brady*, 20 Barb. 119; *Auburn Sav. Bank v. Brinkerhoff*, 44 Hun (N. Y.) 142. A Vermont statute providing that a savings bank shall not extend the time of payment of a loan on personal security for more than one year, is not violated by an agreement extending the time of payment until the payee should be dissatisfied with the security, or until payment was demanded or offered. *Lyndon Sav. Bank v. International Co.*, 62 At. (Vt.) 50.

49 *Franklin Co. v. Lewiston Institution*, 68 Me. 43.

50 *Ibid.*

51 *Paine v. Irwin*, 59 How. Pr. (N. Y.) 316.

52 *Williams v. McKay*, 46 N. J. Eq. 25; and at the time it was made, *Colorado Sav. Bank v. Evans*, 12 Colo. App. 334. Meaning of investment, *Una v. Dodd*, 39 N. J. Eq. 186; *Savings Bank v. Barrett*, 126 Cal. 413.

and mortgages that portion of its fund which must be kept as an "available form" to meet payments;⁵³ or speculate in stocks either directly or through a broker.⁵⁴

The loans of savings banks on real estate security are made on the express or implied condition that the title thereto shall be found satisfactory to the attorney or bank committee having charge of the application. Generally there are statutes prescribing what kind of security can be taken, that it shall be free from encumbrances, or other restrictions that would impair its title and diminish its value. These requirements are as open to the applicants as to the banks themselves. A case rarely arises against a bank for refusing an application.⁵⁵

A savings bank, like other banks, is permitted to take other security for a debt and thus escape loss.⁵⁶ For this purpose it can acquire the stock of another corporation, which would otherwise be an unlawful act.⁵⁷ But if it is taken, even under such forced condition, the bank becomes subject to any liability therefor, like any other stockholder.⁵⁸

31. Loans by Stockholders to Their Bank.

Not infrequently when banks become embarrassed their directors and other stockholders make advances.⁵⁹ When acting from proper motives their action can be sustained,⁶⁰ but in doing so they should clearly state the details of their action, precluding all questions. Unintentionally, in many cases they have left open the very important question, whether their advance was a loan or a contribution of fresh capital. In any

53 *Paine v. Barnum*, 59 How. Pr. (N. Y.) 303.

Contra.—*Rome Sav. Bank v. Kramer*, 32 Hun (N. Y.) 270.

54 *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135.

Contra.—*Sistare v. Best*, 88 N. Y. 527.

55 *Gilson v. Cambridge Sav. Bank*, 180 Mass. 444.

56 *Hill v. Shilling*, 95 N. W. (Neb.) 24.

57 *Ibid.*

58 *Ibid.*; *National Bank v. Case*, 99 U. S. 628.

59 *Bank of Australasia v. Breillat*, 6 Moore P. C. (Eng. Old S.) 152; *Heidbreder v. Superior Ice Storage Co.*, 184 Mo. 446.

60 *Schnittger v. Old Home Mining Co.*, 144 Cal. 603, and cases cited.

case, an agreement among them to contribute in proportion to their respective holdings for the bank's debts is founded on a good consideration, and may be enforced by the bank.⁶¹

Whenever the contribution is regarded as a voluntary assessment, it cannot be set off after the subsequent insolvency of the bank against a debt due from a stockholder.⁶² In other words, a stockholder's liability for such capital is quite the same as for any other capital. But it may be questioned whether subsequent creditors can compel the application of such capital to the payment of their obligations.⁶³ This may depend on the conditions prescribed by the contributors.

When such a loan is an advance, the lenders, in the event of the bank's failure, are to be treated like other creditors.⁶⁴ And if they have made the loan on the pledge of securities, they are entitled to retain them against the receiver subsequently appointed until their claim is discharged.⁶⁵

An advance may have a double aspect: as between him and the bank and its creditors it may be regarded as a fresh contribution of capital; as between him and other stockholders it may be a loan, to be paid in accordance with their agreement.⁶⁶ Thus while directors could not pledge the future earnings of their bank to pay such a loan, there is nothing to prevent the stockholders from making such an agreement.⁶⁷

32. Defences to Loans.

Concerning defences besides those described in other connec-

61 *Lillard v. Decatur Cotton Seed Oil*, 14 Tex. Civ. App. 67.

62 *Broderick v. Brown*, 69 Fed. 497, 499; *Bausman v. Kinnear*, 79 Fed. 172, 175; *Matthews v. Albert*, 24 Md. 527.

63 *Dykman v. Keeney*, 10 N. Y. App. Div. 610 and 16 N. Y. App. Div. 131, 137, *affd.* 160 N. Y. 677.

64 *Murphy v. Pacific Bank*, 130 Cal. 542.

65 *Converse v. Sharpe*, 37 N. Y. App. Div. 399. See *Kinsman v. Fisk*, 83 Hun (N. Y.) 494; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Duncomb v. N. Y. R.*, 88 N. Y. 1, 3, 10, 11; *Buell v. Buckingham*, 16 Iowa 284, 290; *Hotel Co. v. Wade*, 97 U. S. 13, 22, 23, and especially *Wyman v. Bowman*, 127 Fed. 257, 273.

66 *Brown v. Bradford*, 103 Iowa 378.

67 *Ibid.* See Chap. V, §34.

tions there may be mentioned the lack of a quorum at the time of making the loan;⁶⁸ lack of authority to lend;⁶⁹ payment,⁷⁰ improper security;⁷¹ a penal agreement not to hold the accommodation maker of a note in direct opposition to the written agreement expressed by the note itself,⁷² and usury.⁷³

33. Renewals.

Renewal notes are often given. In doing so, the question sometimes is important, especially to sureties, whether the renewal is a continuing obligation, or a new, independent one.⁷⁴ The same question has arisen in renewing certificates of indebtedness, given to stockholders. On a recent occasion of this kind the new certificates were declared to be "new and independent contracts," and formed the basis of the stockholders' liability to the bank's creditors.⁷⁵ A note also that is paid with

68 *Smith v. State Bank*, 18 Ind. 327.

69 *St. Joseph Fire Ins. Co. v. Hauck*, 71 Mo. 465; *Marion Sav. Bank v. Dunkin*, 54 Ala. 471; *Southern Bank v. Williams*, 25 Ga. 534; *Snyder v. State Bank, Breeze (Ill.)* 161; *Smith v. Miss. & Ala. R. Co.*, 6 Sm. & M. (Miss.) 179; *Roe v. Bank*, 167 Mo. 406. Though a national bank has no authority to become the member of a partnership, such action is no defence for the recovery of money loaned to it. *Cameron v. First Nat. Bank*, 4 Tex. Civ. App. 309, second trial 34 S. W. 178. A cashier agreed with the borrower of a note to pay it when due with money owing by the cashier to him, and subsequently he informed the borrower that he had paid it. As he had not, this statement was no defence, "there must have been actual payment to discharge it." *Jackson Co. Bank v. Parsons*, 112 Wis. 265.

70 A loan is paid to a borrower by giving him credit on his pass-book and the books of the bank. *Hannon v. Williams*, 34 N. J. Eq. 255.

71 *Ayres v. Dorsey Produce Co.*, 101 Iowa 141.

72 *Earle v. Enos*, 130 Fed. 467; *Penn Safe Dep. Co. v. Kennedy*, 175 Pa. 164; *Israel v. Gale*, 174 U. S. 395. See note 43 L. R. A. 449. When a bank to which non-negotiable paper is presented for discount makes proper inquiry of the maker and is so assured of his ability to pay that the note is discounted, he cannot afterward deny his liability though the bank gave him no notice of its action in discounting the paper. *Strang v. McArthur Brothers*, 61 At. (Pa.) 1015.

73 *Ewing v. Toledo Sav. Bank*, 43 Ohio St. 31; *Farmers' Bank v. Burchard*, 33 Vt. 346.

74 See *Cake v. First Nat. Bank*, 86 Pa. 303.

75 *Seymour v. Bank*, 79 Minn. 211.

funds obtained from a different source than those received in the beginning is not a renewal of the first, but a new creation.⁷⁶

Again, to recover on renewal notes, the bank's journal and discount books need not show discount entries.⁷⁷ Furthermore, the delivery of an old note at the time of receiving the new one is an extinguishment of the obligation, even if the last possesses little or no value.⁷⁸ A guaranty for the payment of notes, checks and other instruments for a limited time and period covers renewals given in place of the originals.⁷⁹ In some states a renewal is a right under some conditions; in these, of course, the right cannot be claimed without performing them.⁸⁰

34. Paper Left for Discount and Refused.

Paper offered for discount is a bailment, and if declined the

76 *Hartley v. Kirlin*, 45 Pa. 49. A bank cannot, in renewing a note, credit collateral given for the old one to the new note and on other indebtedness without the maker's knowledge and consent. *Assignment of Meyers*, 7 Ohio N. P. 262. A bank discounting a note given in renewal of an illegal one without any knowledge of its character, can enforce payment of it. *Buchanan v. Drover's Nat. Bank*, 5 C. C. A. 83; *Armstrong v. Toler*, 11 Wheat. (U. S.) 258. A bank surrendered a note and took a new one for a still larger amount. This was not regarded as a new loan to the extent of the old amount, relieving the bank from the results of having negligently made the original loan on the faith of forged collateral. *Metro-politan Sav. Bank v. Baltimore*, 63 Md. 6. A national bank which held a note for collection belonging to another bank, of which it was a large stockholder, took a renewal note and included therein a debt against the maker. The national bank also took a mortgage to secure the debt, which was executed before the assistant cashier, who was also a director. It was held that he could not lawfully take the acknowledgment, and it was therefore void. *Wilson v. Greiss*, 64 Neb. 792. The vice-president of a bank gave a note to another bank signed by himself, a director, and endorsed by the bank and by its president, which was renewed by a note signed for the bank by its cashier, who was the managing officer. Though the loan was not in truth for the bank and it did not receive the money, it was liable therefor. *First Nat. Bank v. Arnold*, 156 Ind. 487.

77 *Moseby v. Bedford Co. Bank*, 3 Pa. Sup. Ct. Cases 62.

78 *Philadelphia Butchers' Assn. v. Reimann*, 2 Pa. Co. Ct. 211.

79 *Fifth Nat. Bank v. Woolsey*, 31 N. Y. App. Div. 60.

80 *Hays v. State Bank, Martin & Yerg.* (Tenn.) 179.

bank is not legally required to notify the offerers.⁸¹ But it cannot retain the paper as collateral for other indebtedness,⁸² or discount it and apply the proceeds to extinguish another debt of the offerer.⁸³

35. Damage on Promised, but Not Executed, Loan.

Should a bank not fulfil its agreement to loan money to an individual, the borrower is not entitled in the way of damages to the difference in interest between the agreed rate and that actually paid elsewhere without showing he could borrow for no less from any other source.⁸⁴

36. Interest.

The same law applies to both corporate banks and individuals in agreeing to a rate for the use of money, unless a different rule is prescribed by charter.⁸⁵ When it is, a bank's

81 *Parry v. Highley*, 8 Pa. Co. Ct. 584.

82 *Bank v. White*, 154 U. S. 660; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 501; *Lucas v. Dorrien*, 7 Taunt. (Eng.) 278. A bank cannot set off a note left by a depositor for discount, after refusing to comply with his request, in an action subsequently brought by the assignee of the depositor on a debt due from the bank to him before his insolvency. *Stetson v. Exchange Bank*, 7 Gray (Mass.) 425. The refusal of the bank to deliver the note was a conversion for which a proper action would lie. *Ibid*.

83 *Parry v. Highley*, 8 Pa. Co. Ct. 584; *Petrie v. Myers*, 54 How. Pr. (N. Y.) 513. A promissory note was delivered by the maker to the payee to be discounted for the maker's benefit. The bank refused to discount it at the time of its presentation, but did so afterwards, and permitted the payee to draw against it, which he did. The maker was liable for the amount drawn. *Platt v. Beebe*, 57 N. Y. 339. The cashier of a bank negotiated a loan for a stockholder, who requested the proceeds to be remitted. Instead of doing so, the cashier deposited the proceeds in the bank, which appropriated them to pay an indebtedness due from the borrower. The cashier's act was a fraud of which the bank could not take advantage and therefore could not return the money. *Winslow v. Harriman Iron Co.*, 42 S. W. (Tenn. Ch. App.) 698.

84 *Blue v. Capital Nat. Bank*, 145 Ind. 518.

85 *Bank v. Mandeville*, 1 Cranch C. C. (U. S.) 552; *Durkee v. City Bank*, 13 Wis. 216; *Farmers' Bank v. Burchard*, 33 Vt. 346, 378; *Lumberman's Bank v. Bearce*, 41 Me. 505; *Billingsley v. State Bank*, 3 Ind. 375; *Chafin v. Lincoln Sav. Bank*, 7 Heisk. (Tenn.) 499; *Stribbling v. Bank*, 5 Rand. (Va.) 132.

A statute authorizing banking corporations with power to lend "at a rate

own special rule must be observed ⁸⁶ in all contracts, regardless of state boundaries.⁸⁷

In lending to a person outside the state, the contract may be regarded from two points of view; by the state where the bank is located, and by the other state. Four different principles have been applied to foreign contracts by the home state whenever a bank's charter has not stood in the way of applying them. First, that the rate of interest must not exceed that of the home state even though the contract be made and payable in a state permitting a higher rate.⁸⁸ Second, the higher rate of interest in the state where the contract is made and the money is payable if the parties thus agree may be taken.⁸⁹ This rule is of wide application. Third, the parties may agree to the rate existing in the state where either contracting party lives if the contract has been made and is to be executed in either or both of them.⁹⁰ This rule cuts all difficulties and

of interest not to exceed ten per cent. per annum" does not invalidate a note for a loan taken at a higher rate of interest. *Farmers & Traders' Bank v. Harrison*, 57 Mo. 503.

86 *Bank v. Sterling*, 2 La. 60; *Clinton R. v. Kernan*, 10 Rob. (La.) 174; *Grand Gulf Bank v. Archer*, 8 Sm. & M. (Miss.) 151; *Stribbling v. Bank*, 5 Rand. (Va.) 132; *Rock River Bank v. Sherwood*, 10 Wis. 230; *Farmers' Bank v. Burchard*, 33 Vt. 346, 380. "The rule of comity does not extend so far as to legalize a contract in excess of its chartered privileges made by a foreign corporation in another state, although such contract be authorized in the state where made as a legitimate exercise of power by its own citizens, whether natural or incorporated." *McIlvaine, Ch. J., Ewing v. Toledo Sav. Bank*, 43 Ohio St. 31, 37.

87 *Ewing v. Toledo Sav. Bank*, 43 Ohio St. 31; *Farmers' Bank v. Burchard*, 33 Vt. 346, 395, 396.

88 *Ewing v. Toledo Sav. Bank*, 43 Ohio St. 31; *Farmers' Bank v. Burchard*, 33 Vt. 346, 395, 396. See *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519.

89 *Hitchcock v. United States Bank*, 7 Ala. 386; *Frazier v. Willcox*, 4 Rob. (La.) 517; *Erwin v. Lowry*, 6 Rob. (La.) 28; *Depau v. Humphreys*, 8 Martin (La. N. S.) 1; *Knox v. Bank*, 27 Miss. 65; *Waverly Nat. Bank v. Hall*, 150 Pa. 466; *Buchanan v. Drovers' Nat. Bank*, 5 C. C. A. 83; *Cockle v. Flack*, 93 U. S. 344; *Bard v. Poole*, 12 N. Y. 495.

90 *Peck v. Mayo*, 14 Vt. 33, 38; *McAllister v. Smith*, 17 Ill. 328; *Kilgore v. Dempsey*, 25 Ohio St. 413, 418; *Chapman v. Robertson*, 6 Paige (N. Y.) 627; *British Am. Mortgage Co. v. Bates*, 58 S. C. 551; *Townsend v.*

ought to be universal. Fourth, as the logical result of this rule the parties may make a valid contract for the payment or performance of the contract in any other state than that where either of them resides.⁹¹

The rights and duties of a surety are determined by the law of the state that determines the rights and duties of the principal debtor. Says Justice Green: "The right of a surety to discharge his obligation by notice to the creditor to pursue the debtor is an incident of the contract of suretyship. It is a part of the law of that contract and is therefore a part of the contract itself."⁹²

37. Loans by Foreign Bank.

The authority of a state to lend outside the state of its creation has been considered in another chapter.⁹³ And a foreign bank whose charter imposes no restriction upon the security for its loans may take and hold a mortgage on land in another state and enforce collection through the instrumentality of its courts like any other creditor.⁹⁴

Riley, 46 N. H. 300; Richards v. Globe Bank, 12 Wis. 692; Newman v. Kershaw, 10 Wis. 333, 340; Kennedy v. Knight, 21 Wis. 340; Dugan v. Lewis, 79 Tex. 246; Cromwell v. County of Sac, 96 U. S. 51.

⁹¹ Thornton v. Dean, 19 S. C. 583; Wayne Co. Sav. Bank v. Low, 81 N. Y. 566; Bigelow v. Burnham, 83 Iowa 120; Scott v. Perlee, 39 Ohio St. 63; Tilden v. Blair, 21 Wall. (U. S.) 241; Junction Railroad Co. v. Bank of Ashland, 12 Wall. 226; Cromwell v. County of Sac, 96 U. S. 51; Cockle v. Flack, 93 U. S. 344. See note, 46 Am. St. Rep. 201.

Contra.—Martin v. Johnson, 84 Ga. 481; Falls v. United States Sav. & Loan Co., 97 Ala. 417.

⁹² Tenant v. Tenant, 110 Pa. 478, 485.

⁹³ Chap. I, §27.

⁹⁴ Lebanon Sav. Bank v. Hollenbeck, 29 Minn. 322.

CHAPTER VIII.

AUTHORITY, DUTY AND LIABILITY OF DIRECTORS.

1. Classification of officers.
2. Directors are not the bank.
3. Who is a de facto director.
4. Election of directors. Qualifications.
5. How restrained from acting.
6. Duration of authority.
7. Can act only as a board.
8. Meetings.
9. Unanimity of action.
10. Authority of committee.
11. Records of action.
12. Compensation.
13. General authority.
14. Authority to contract with their bank.
15. Authority to employ and discharge officers.
16. Duty to notify bank of important matters.
17. Duty to make dividends.
18. Duty to make examinations and reports.
 - a. Examinations.
 - b. Reports.
19. Restrictions on their authority.
20. Their liability at common law.
21. Difficulty in prescribing rule of duty and liability.
22. Minimum rule. Ordinary care.
23. Maximum rule. Prudence.
24. These rules regard their liability from different points of view.
25. Rule of comparative local duty.
26. Unpaid service does not lessen their liability.
27. Elimination of four classes of cases.
 - a. Fraud.
 - b. Mistakes.
 - c. Specific violations of statute.
 - d. Wrongful or neglectful exercise of authority.
 - d1. Usurpation.
 - d2. Wrongful delegation of authority.
28. Harmonious application of law to these four classes of cases.
29. They are cases of super-negligence.
30. Only cases of real negligence left for consideration.
31. Application of the two rules of duty to them.
32. Narrowing of directors' responsibility.
33. Duty of non-resident and absent directors.
34. Effect of resigning and of immediate re-election.
35. Director is liable only for his own negligence. Minority.
36. Action by solvent bank, or if insolvent, its representative, against them.
37. Action of stockholders of solvent bank against them.
38. Nature of remedy.

- | | |
|---|---|
| 39. Action by creditors.
a. In place of bank or receiver.
b. When they can sue for themselves.
40. Duration of directors' liability.
a. Are not held as express trustees. | b. Savings bank directors are excepted.
2. Statute runs from time when openly known.
41. Survival of action.
42. Effect of releasing one, but not all directors.
43. Rule of duty and liability applying to managing partner. |
|---|---|

1. Classification of Officers.

Having described the authority of banking corporations, the inquiry follows by whom may this authority be exercised? It is divided between three well-defined classes. The directors; the managing officers, who may be the president, or vice-president, or cashier, or several of these officers; and minor officers or subordinates and special agents. The functions of directors will be first considered.

2. Directors Are Not the Bank.

Directors of a corporate bank are not the bank itself, though they "constitute," says Chief Justice Shaw, "to all purposes of dealing with others, the corporation."¹ Their authority is limited and consequently all who deal with them must know how much authority they possess.² Nor do they exercise a delegated authority in the same sense that the term is applied to those who are constantly or specially employed by a corporation.³ A director may be delegated to act for his bank in a special transaction and when thus acting is an agent in the usual sense of the term.⁴

3. Who is a de Facto Director.

A director who has been elected by legal form is an officer de facto if not de jure and may transact the ordinary duties of

¹ Burrill v. Nahant Bank, 2 Met. (Mass.) 163, 167.

² Village of Port Jervis v. First Nat. Bank, 96 N. Y. 550, 559; Bedford R. Co. v. Bowser, 48 Pa. 29, 37.

³ Burrill v. Nahant Bank, 2 Met. (Mass.) 163, 167.

⁴ Village of Port Jervis v. First Nat. Bank, 96 N. Y. 550, 559; Branch of Bank of Ala. v. Collins, 7 Ala. 95.

director.⁵ Even if elected by a less number of votes than is required by charter he has the right to act *de facto* and his action will be binding on third persons.⁶

As they are presumed to be rightfully in office they may incur the statutory liability for the debts of the bank though irregularly elected.⁷ And when chosen and recognized by the stockholders they cannot avoid the debts of the bank on the ground of illegality in their election.⁸

4. Election of Directors. Qualifications.

The general laws or special charter of a bank and by-laws regulate their mode of election.⁹ If some of them must be merchants, manufacturers or mechanics to fulfil a charter requirement, they need not be thus actively engaged at the time of their election.¹⁰

The national banking law prescribes that every bank must have at least five directors, who must be citizens, that three-fourths of the entire number must live in the state where the bank is located, and must own ten or more shares of stock. Though holding office for a year,¹¹ they are not prohibited from resigning.¹²

5. How Restrained from Acting.

An injunction will not be granted on an *ex parte* application to restrain them from exercising their powers if their election

5 *Mechanics' Nat. Bank v. H. C. Burnet Mfg. Co.*, 32 N. J. Eq. 236; *Mining Co. v. Anglo-Cal. Bank*, 104 U. S. 192; *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 159 Mass. 505; *Baird v. Bank of Washington*, 11 Serg. & R. (Pa.) 411; *Hamilton Trust Co. v. Clemes*, 163 N. Y. 423.

6 *Baird v. Bank of Washington*, 11 Serg. & R. (Pa.) 411.

7 *Clifford, J., Steam Engine Co. v. Hubbard*, 101 U. S. 188, 192, citing *Newcomb v. Reed*, 12 Allen (Mass.) 362; *Haynes v. Brown*, 36 N. H. 545, 563.

8 *Cooper v. Curtis*, 30 Me. 488; *Little v. Obrien*, 9 Mass. 423.

9 *State v. Ashley*, 1 Ark. 513; *Jordy v. Hebrard*, 18 La. 455; *Prieur v. Commercial Bank*, 7 La. 509; *State v. Thompson*, 27 Mo. 365.

10 *Gray v. Mechanics' Bank*, 2 Cranch C. C. 51.

11 Rev. Stat. §§5145, 5146.

12 *Movius v. Lee*, 30 Fed. 298, 301.

was "colorable in point of law, though it may afterwards turn out to have been fraudulent in point of fact."¹³

6. Duration of Authority.

Once elected and accepting¹⁴ their authority continues until their successors are chosen and qualify;¹⁵ nor does their failure to serve work a renunciation of the office.¹⁶ Their authority to act and incur liability ends with the solvency of the bank and the beginning of its liquidation.¹⁷ A judgment, therefore, on such a liability by collusion with the officers does not conclude the stockholders.¹⁸

Though a director be a stockholder, yet if he should act after selling his stock or become bankrupt his conduct would be valid with respect to third persons.¹⁹ And if a cashier or president be a director he may continue to serve in the latter capacity after his retirement or removal from the other office.²⁰

But if the office of director or other office becomes vacant by operation of law, for example in consequence of his indebtedness to the bank, it cannot by any means, direct or indirect, make him a de jure or de facto officer so long as his disability continues.²¹

13 *Ogden v. Kip*, 6 Johns. Ch. 160; *Hartridge v. Rockwell*, R. M. Charl. (Ga.) 260. See *Bank of Dansville*, 6 Hill (N. Y.) 370. Their election cannot be set aside for a mere irregularity. *Hardenburgh v. Farmers' & Mech. Bank*, 3 N. J. Eq. 68.

14 *Bramblet v. Commonwealth Land Co.*, 83 S. W. (Ky.) 599.

15 *Sparks v. Farmers' Bank*, 3 Del. Ch. 274; *Milliken v. Steiner*, 56 Ga. 251; *St. Louis Loan Assn. v. Augustin*, 2 Mo. App. 123; *Nashville Bank v. Petway*, 3 Humph. (Tenn.) 522; *Gilchrist v. Wyer*, 2 N. Bruns. 249.

16 *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308.

17 *Moss v. Whitzell*, 108 Fed. 579; *Richmond v. Irons*, 121 U. S. 27; *Schrader v. Manuf. Nat. Bank*, 133 U. S. 67.

18 *Ibid.*

19 *San Jose Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179. See *Howle v. Scarbrough*, 138 Ala. 148.

20 *Atlas Nat. Bank v. B. F. Gardner Co.*, 8 Biss. (U. S.) 537, 543.

21 *Cupit v. Park City Bank*, 20 Utah 292; *Chemical Nat. Bank v. Colwell*, 132 N. Y. 250; *Bartholomew v. Bentley*, 1 Ohio St. 37, 42.

7. Can Act Only as a Board.

Directors can act only as a board in conducting the business, either of a state or national bank.²² Their separate assent or determination is not the assent of the corporation.²³ In like manner their individual declarations concerning the business of the bank are not effective.²⁴

A different effect is given to their assent to past transactions. These may be ratified by retaining the fruits with a full knowledge of what has been done;²⁵ by authorizing other acts, like the bringing of a suit springing from the transaction;²⁶ by hearing of them and making no immediate objection;²⁷ and

22 *First Nat. Bank v. Drake*, 29 Kan. 311 and 35 Kan. 564; *Baldwin v. Canfield*, 26 Minn. 43 and cases cited; *Harper v. Calhoun*, 7 How. (Miss.) 203; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205; *Edgerly v. Emerson*, 23 N. H. 555; *First Nat. Bank v. Christopher*, 40 N. J. Law 435, 436; *Schumm v. Seymour*, 24 N. J. Eq. 143, 153; *Thatcher v. West River Nat. Bank*, 19 Mich. 196; *Murphy v. Gumaer*, 12 Colo. App. 472, 483. See *People's Bank v. St. Anthony's R. C. Church*, 109 N. Y. 512; *Columbia Bank v. Gospel Tab. Church*, 127 N. Y. 361, 368.

23 *Eliot v. Abbot*, 12 N. H. 549; *Harper v. Calhoun*, 7 How. (Miss.) 363. See cases in note 1; also *Edgerly v. Emerson*, 23 N. H. 555 "It is the board duly convened and acting as a unit that is made the representative of the company. The assent or determination of the members of the board acting separately and individually is not the assent of the corporation." *First Nat. Bank v. Drake*, 35 Kan. 564, 576. In *Pierce v. Morse-Oliver Building Co.*, 94 Me. 406, 412, *Savage, J.*, said: "Directors, individually, cannot bind or affect the rights of the corporation. It is not necessary that their votes should be formal ones, nor necessarily in formal meetings, nor that they should be proved by record. But whatever they do, the source of their authority must be found ultimately in the action of the board as such," citing many cases. In *Foot v. Rutland R.*, 32 Vt. 633, 637, the court has declared that "the action of directors, though acting separately, if in the usual sphere of directors, binds the company." Though cited with approval in *Hardwick Sav. Bank v. Drenan*, 71 Vt. 289, 293, it is opposed to the strong general current of authority. See cases in 3 *Clarke & Marshall on Priv. Corp.* §677, p. 3074.

24 *Pemigewasset Bank v. Rogers*, 18 N. H. 255; *National Bank v. Norton*, 1 Hill (N. Y.) 572, 579; *Soper v. Buffalo & Rochester R.*, 19 Barb. (N. Y.) 310, 312; 2 *Cook on Corp.* §712, 713a.

25 *Hoyt v. Thompson*, 19 N. Y. 207; *Steinke v. Yetzer*, 108 Iowa 512.

26 *Corser v. Paul*, 41 N. H. 24; *Bank of Augusta v. Conrey*, 28 Miss. 667; *Mechem on Agency*, §151.

27 *First Nat. Bank v. Fricke*, 75 Mo. 178; *Hill v. Bank*, 87 Mo. App.

by individual assent.²⁸ Such an extension of the rule concerning ratification is imperative in consequence of the modern methods of banking; and especially the small and irregular attendance of directors at board meetings.²⁹

An act done before incorporating a bank may be ratified by the directors afterward.³⁰ But they cannot ratify an act which they could at no time legally perform.³¹ Thus they could not increase a cashier's salary for a period already completed.³²

8. Meetings.

The meetings of directors are largely regulated by statute and by-law. Generally, the notification does not state the object, or only in the most general terms, of a regular or stated meeting;³³ but the by-laws usually require the notice to describe the object of a special meeting.³⁴ A meeting will be presumed to be regular, unless the contrary appears.³⁵

A long established custom of holding meetings and transacting business at the bank during business hours whenever a sufficient number are present serves as a standing notice to each director and they can proceed unless a by-law prescribes a different course.³⁶ Unless the charter, by-law or general

590; *Kelsey v. National Bank*, 69 Pa. 426; *Bank v. Reed*, 1 Watts & S. (Pa.) 101.

28 *Scott v. Superior Oil Co.*, 144 Cal. 140; *Crowley v. Genesee Mining Co.*, 55 Cal. 273; *Fraser v. San Francisco Bridge Co.*, 103 Cal. 79.

29 *Nebraska & Kan. Farm Loan Co. v. Bell*, 7 C. C. A. 253; *Deposit Bank v. Fleming*, 19 Ky. L. Rep. 1947.

30 *Dubuque Female College v. District Township*, 13 Iowa 555, 561.

31 *First Nat. Bank v. Drake*, 29 Kan. 311, 321.

32 *Ibid.*

33 *Sampson v. Bowdoinham Steam Mill Co.*, 36 Me. 78.

34 *Imperial Bank of China v. Bank of Hindustan*, L. R. 6. Eq. (Eng.) 91. See *Heintzelman v. Druids' Relief Assn.*, 38 Minn. 138.

35 *Sargent v. Webster*, 13 Met. (Mass.) 497; *Beardsley v. Johnson*, 121 N. Y. 224, 228; *Wells v. Rodgers*, 60 Mich. 525.

36 *First Nat. Bank v. American Ex. Nat. Bank*, 48 U. S. App. 633. See Chap. IV, §35. A meeting of the board without notice to one of the members at which there was not a quorum of qualified directors present, cannot ratify an unauthorized act of an officer. *Cupit v. Park City Bank*, 20 Utah 292, and cases cited.

statute forbids, the directors may hold a corporate meeting outside the state.³⁷

9. Unanimity of Action.

The general rule is a majority or quorum of the directors must be present, and action by a majority of them is legal.³⁸ In ascertaining the constitution of the majority, *ex officio* members are not always counted.³⁹ Of course, this rule may be modified by statute, charter or by-law.⁴⁰

Generally, a statute or by-law requires a specified number to constitute a quorum; and the president, if possessing all the powers of a director (and the exceptions are rare) may act as one of the number.⁴¹ And if there be no statute or by-law, the law presumes that a majority constitute a quorum.⁴² In no case can a director permit or authorize another director to act for him.⁴³ But a board, consisting by law of a specified number, may delegate their authority to a quorum composed of less than a majority of all.⁴⁴ And a by-law declaring that the ordinary business may be transacted by a quorum composed of less than a fourth of the entire number is valid. Such a by-law includes authority not only to transact the general business of the bank, but as incidental thereto, authority to pledge or assign its assets to secure a debt.⁴⁵

Unanimous action by a quorum at a casual meeting is binding on the bank, though no notice had been given to the

37 *Union Nat. Bank v. State Nat. Bank*, 155 Mo. 95, 105.

38 *Sargent v. Webster*, 13 Met. (Mass.) 497; *Ex parte Willcocks*, 7 Cow. (N. Y.) 402; *Edgerly v. Emerson*, 23 N. H. 555; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205; *Metropolitan Telephone & Tel. Co. v. Domestic Tel. Co.*, 44 N. J. Eq. 568, 573. For more cases see 3 *Clarke & Marsh. on Private Corp.*, §681, note 809. See Chap. IV. §35.

39 *Miller v. Chance*, 3 Edw. Ch. (N. Y.) 399.

40 *Edgerly v. Emerson*, 23 N. H. 555.

41 *Bank v. Ruff*, 7 Gill & J. (Md.) 448.

42 *Silby v. Strong*, 38 Or. 36.

43 *Percy v. Millaudon*, 8 Martin (La. N. S.) 32.

44 *Hoyt v. Thompson*, 19 N. Y. 207.

45 *Ibid.*

absentees, unless this was required by charter, statute or by-law.⁴⁶

10. Authority of Committee.

Not infrequently directors delegate their authority to a committee, composed of three or more of their body, to do specific things, audit the bank's accounts, make loans of a specific kind,⁴⁷ purchases or loans in general⁴⁸ and convey real estate,⁴⁹ make examinations,⁵⁰ and manage other matters.⁵¹ Generally, committees possess whatever authority is given to them; and their wrongful conduct is rarely visited on the entire body.⁵² But in some cases a board has been rendered liable for transferring duties to a committee, or to one or more officers, that ought to have been performed by the entire bank.⁵³ Their acts, unless wrongful, may be ratified like those of a president or other officer.⁵⁴

11. Records of Action.

The proceedings of directors need not be recorded, unless this is required by statute, and may be proved by parol evi-

⁴⁶ Ibid.

⁴⁷ *Stone v. Rottman*, 183 Mo. 552; *Oakland Bank v. Wilcox*, 60 Cal. 126; *Maryland Trust Co. v. National Mechanics' Bank*, 63 At. (Md.) 70.

⁴⁸ *Bryant v. Bank of Commerce*, 95 Wis. 476.

⁴⁹ *Campbell v. Watson*, 62 N. J. Eq. 396.

⁵⁰ *Burrill v. Nahant Bank*, 2 Met. (Mass.) 163.

⁵¹ *Hanna v. People's Nat. Bank*, 35 N. Y. Misc. 517.

⁵² *Farmers' Loan & Trust Co. v. Mann*, 4 Robt. (N. Y.) 356. See *State Bank v. Mentzer*, 100 N. W. (Iowa) 69. Such a committee must not exceed its instructions. *Bryant v. Bank*, 95 Wis. 476. And if they neglect to do their duty they are personally responsible; for example, if they are authorized to lend the bank's money and yield up their authority to the cashier, who lends the greater part of the bank's resources to one person unworthy of credit. *Hanna v. People's Nat. Bank*, 35 N. Y. Misc. 517. A committee which, by by-law, ought to have been composed of three persons was not deprived of authority through the bank's failure to appoint the third member. *Wallace v. Exchange Bank*, 126 Ind. 265.

⁵³ See §§ 18, 27d 2.

⁵⁴ *Burrill v. Nahant Bank*, 2 Met. (Mass.) 163. See *Greenfield Sav. Bank v. Simons*, 133 Mass. 415.

dence.⁵⁵ If a written record is kept, as this is the best evidence, it must be produced.⁵⁶ It may be added that the records of a bank are open to the inspection of all their members; no one can be excluded even by resolution.⁵⁷

12. Compensation.

Usually, though not always,⁵⁸ directors are not paid for their ordinary services; nor does the law imply a promise that they shall be remunerated.⁵⁹ Furthermore, in no case can they compensate themselves.⁶⁰ To justify such action their compensation must have been fixed by a resolution or by-law adopted before rendering the service.⁶¹ However valuable this may have been, it is obviously wrong for them to compensate themselves, constituting as they do, both parties to the transaction. But public policy does not forbid a board from compensating a director for a special service,⁶² though it would not be proper for him to join in such action.⁶³ For the same reason a director who is serving as president, secretary or other special capacity, ought not to join in compensating

55 *Edgerly v. Emerson*, 23 N. H. 555, 556; *Langsdale v. Bonton*, 12 Ind. 467; *Whittington v. Farmers' Bank*, 5 Har. & J. (Md.) 489; *Hendrie & Boetkoff Mfg. Co. v. Collins*, 29 Colo. 102; *Assignment of Bank of West Superior*, 109 Wis. 672 and cases cited.

56 *Assignment of Bank of West Superior*, 109 Wis. 672, 676.

57 *People v. Throop*, 12 Wend. (N. Y.) 183.

58 See §19, also Chap. IX. §4, and 2 Cook on Corp. §657.

59 *Ellis v. Ward*, 137 Ill. 509; *Wickersham v. Crittenden*, 93 Cal. 17, 32.

60 *Mobile Branch Bank v. Scott*, 7 Ala. 107; *Mobile Branch Bank v. Collins*, 7 Ala. 95; *Wickersham v. Crittenden*, 93 Cal. 17; *Accommodation Loan Assn. v. Stonemetz*, 29 Pa. 534; *Hall v. Vt. & Mass. R.*, 28 Vt. 401.

61 *Ellis v. Ward*, 137 Ill. 509; *Fritze v. Equitable B. & L. Society*, 186 Ill. 183, and cases cited; *Bassett v. Fairchild*, 132 Cal. 637.

Contra.—*Godbold v. Branch Bank*, 11 Ala. 191.

62 *Wickersham v. Crittenden*, 93 Cal. 17, 32; *Chandler v. Monmouth Bank*, 13 N. J. Law 255; *Huffaker v. Krieger*, 197 Ky. 200.

63 *Ibid* and cases cited; *Ward v. Davidson*, 89 Mo. 445; *Gardner v. Butler*, 30 N. J. Eq. 702; *Butts v. Wood*, 37 N. Y. 317; *Copeland v. Johnson Mfg. Co.*, 47 Hun (N. Y.) 235; *Kelsey v. Sargent*, 40 Hun 150.

himself.⁶⁴ Stockholders only should thus act; and in many cases their will is expressed in a by-law.⁶⁵

13. General Authority.

Both the general, and specific authority of directors is prescribed by positive law. One of the first things to be done after organizing is to adopt by-laws,⁶⁶ unless these have been formulated and adopted by the stockholders.⁶⁷ They must be reasonable, and not contravene, repeal or in any wise change, the statutory or common law.⁶⁸ Closely following this act is the election of a president.⁶⁹

They have authority also to procure subscriptions for stock⁷⁰ and to regulate its *legal* transfer,⁷¹ take it in payment of a debt,⁷² compromise a claim,⁷³ bring suits and employ counsel,⁷⁴ borrow⁷⁵ and lend money for their bank,⁷⁶ declare

64 *Fritze v. Equitable B. & L. Assn.*, 186 Ill. 183; *Wickersham v. Crittenden*, 93 Cal. 17, 32 and cases cited.

65 2 Cook on Corporations, §657. See *Jones v. Morrison*, 31 Minn. 140; *Gardner v. Butler*, 30 N. J. Eq. 702; *Bassett v. Fairchild*, 132 Cal. 637.

66 *People v. Throop*, 12 Wend. (N. Y.) 183, 186.

67 See Ch. III.

68 *People v. Throop*, 12 Wend. (N. Y.) 183, 186.

69 4 Thompson on Corp. §4611.

70 *Farmers' & Mech. Bank v. Nelson*, 12 Md. 35.

71 *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; *Cunningham v. Ala. Life Ins. Co.*, 4 Ala. 652; *Vansands v. Middlesex Co. Bank*, 26 Conn. 144, 154; *Jennings v. Bank*, 79 Cal. 323, 331; *M'Dowell v. Bank*, 1 Harr. (Del.) 27; *Mechanics' Bank v. New York & N. H. R.*, 13 N. Y. 599, 622; *Leggett v. Bank*, 24 N. Y. 283; *Stebbins v. Phoenix Ins. Co.*, 3 Paige (N. Y. 350, 361; *Union Bank v. Laird*, 2 Wheat. 390. See Chap. IV, §13.

72 *Hartridge v. Rockwell*, R. M. Charl. (Ga.) 260; *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *City Bank v. Bruce*, 17 N. Y. 507; *Iowa Lumber Co. v. Foster*, 49 Iowa 25; *Eby v. Guest*, 94 Pa. 160; *Farmers' & Mech. Bank v. Champlain Transp. Co.*, 18 Vt. 131. See *Abeles v. Cochran*, 22 Kan. 405.

73 *Bank v. Bailhache*, 65 Cal. 327; *Lewis v. Eastern Bank*, 32 Me. 90; *First Nat. Bank v. National Ex. Bank*, 92 U. S. 122.

74 *Lewis v. Eastern Bank*, 32 Me. 90, 91.

75 *Ridgway v. Farmers' Bank*, 12 Serg. & R. (Pa.) 256; *Clark v. Titcomb*, 42 Barb. 122, 124.

76 *Bank Commissioners v. Bank of Buffalo*, 6 Paige (N. Y.) 497, 503. See Chap. VII. §21. If by the rules and usages of a bank all renewals are

dividends,⁷⁷ and, should their bank become insolvent, make an assignment.⁷⁸

14. Authority to Contract With Their Bank.

The difficult part of the field to traverse is in matters wherein directors have a personal interest.⁷⁹ These fall into a triple classification: (a) Those in which the directory act as a unit; (b) those in which the bank is properly represented by the board; and (c) those transactions in which some of the officers make wrongful contracts with the bank without the knowledge either before, or afterward, of the directory or governing body.

(a.) Transactions of the first class are always open to investigation. Directors cannot stamp the contracts in which they are thus acting in a twofold capacity with the seal of certainty. The test of honesty and wisdom in making them must be applied by others before their validity passes beyond the stage of questioning. Such contracts, to which one or more of their number are parties, are viewed with suspicion by courts, and may be set aside on slight grounds. The remarks of Judge Nelson⁸⁰ are worth adding, for they are made

made by the directors, a renewal by the cashier would not be binding unless it was ratified. *Gray v. Farmers' Nat. Bank*, 81 Md. 631, 640, 642.

⁷⁷ *Williams v. Western Union Tel. Co.*, 93 N. Y. 162; *Beveridge v. New York Elevated R.*, 112 N. Y. 1. See §17.

⁷⁸ *Chew v. Ellingwood*, 86 Mo. 260; *Eppright v. Nickerson*, 78 Mo. 482; *Gibson v. Goldthwaite*, 7 Ala. 281. See Chap. XXIX, §4.

⁷⁹ See Chaps. XII. §§7, 9, and VII. §14. In *Schnittger v. Old Home Mining Co.*, 144 Cal. 603, 606, the court said: "A director of a corporation, like any other trustee, is bound to act in the utmost good faith toward his beneficiary (Civ. Code, Sec. 2228), and is forbidden to take part in any transaction concerning the trust in which he has an interest adverse to that of his beneficiary (Civ. Code, Sec. 2230), but he is not absolutely precluded from dealing directly with the corporation of which he is a director."

⁸⁰ *Hubbard v. New York Investment Co.*, 14 Fed. 675; *First Nat. Bank v. Gifford*, 47 Iowa 575; *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557; *Stark Bank v. United States Pottery Co.*, 34 Vt. 144; *Greenfield Sav. Bank v. Simons*, 133 Mass. 415; *Gallery v. National Ex. Bank*, 41 Mich. 169; *Leonhardt v. Citizens' Bank*, 56 Neb. 38. See many cases cited

in the clear light of long experience. "The validity of such a contract must therefore depend upon the nature and terms of the contract itself, and the circumstances under which it is made. The motives of the parties are not necessarily material, but the effect of the provisions of the contract must be especially regarded, and if they are pernicious and tend to work a fraud on the rights of the corporation and stockholders, in such case the directors must be regarded as having no authority to enter into it."

(b.) When a bank is represented in a transaction of this kind by a portion of the board, the contract is valid for there are two contracting parties.⁸¹ But enough directors must be present and act independently to stamp the transaction with all the essentials of a contract. Should there be a conspiracy or agreement among them to lend the bank's money to each other, though in each particular case the borrower might not vote for the loan made to himself, the loans could be set aside as fraudulent.

Again, should the president or other officer make a loan to himself, the knowledge of which should subsequently come to the directors and pass without objection, their silence would operate as a ratification.⁸²

(c.) Falling within the third class are transactions which

in note, 14 Fed. 679, and in *Clarke & Marsh on Priv. Corp.* §760. In a recent case the court said: "Directors of a corporation stand in equity in a fiduciary capacity as to the corporation and stockholders. They are not allowed to profit by virtue of their position. They must exercise the utmost good faith in all transactions touching their duties to the corporation and its property. All their acts must be for the benefit of the corporation and not for their own benefit. If by their acts the directors have received any profits from the company's property or business, they hold the same as trustees for the benefit of the corporation and its stockholders." *Coombs v. Parker*, 31 Mont. 526, 544; *Gerry v. The Bismarck Bank*, 19 Mont. 191.

81 *Tecumseh Nat. Bank v. Chamberlain Banking House*, 63 Neb. 163; *Schnittger v. Old Home Mining Co.*, 144 Cal. 603, 606; *Stratton v. Allen*, 16 N. J. Eq. 229. See Chap. IX, §14.

82 *Reynolds v. Bank of Mt. Vernon*, 6 N. Y. App. Div. 62, affd. 158 N. Y. 740.

are conceived with a motive to serve the interests of the directors at the loss of the corporation. These must be smitten down, because the same party cannot act for themselves and for their bank in committing a fraud.⁸³

15. Authority to Employ and Discharge Officers.

In selecting and retaining officers for their bank, directors must select and retain those who are competent and trustworthy, but, in doing this, do not become their sureties for fidelity and good behavior. Provided they exercise their best judgment in these regards, directors are not responsible should their appointees prove to be incompetent and unworthy of trust. If, however, they were fit at the time of their appointment and afterward degenerate, engage in speculations, undertake private enterprises to their bank's detriment, and, after the discovery of these things, are continued in office, the directors would be responsible.⁸⁴

16. Duty to Notify Bank of Important Matters.

In notifying the bank of anything important that comes within a director's ken, the rule itself is clear, though its application is not always easy. As he acts ordinarily only as a

83 If a director is forbidden from borrowing from his bank, and a loan is made to him, he must pay it. *Brittan v. Oakland Bank*, 124 Cal. 283.

84 *Briggs v. Spaulding*, 141 U. S. 132; *Warner v. Penoyer*, 33 C. C. A. (U. S.) 222; *Swentzel v. Penn Bank*, 147 Pa. 140; *Bloom v. National Sav. & Loan Co.*, 81 Hun (N. Y.) 120; *Vance v. Phoenix Ins. Co.*, 4 Lea (Tenn.) 385; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Ricker v. Hall*, 69 N. H. 592; *Commercial Bank v. Chatfield*, 121 Mich. 641; *Savings Bank v. Caperton*, 87 Ky. 306. Directors who are authorized to appoint a cashier may intrust him with the money and valuable papers of the bank. *Mason v. Moore*, 76 N. E. (Ohio) 932. They are not negligent in employing the same person to act as cashier, bookkeeper and teller. *Savings Bank v. Caperton*, 87 Ky. 306. In a recent case the court remarked that directors "are not liable for losses resulting through *secret* speculations and *secret* false entries of the cashier." *Mason v. Moore*, 76 N. E. (Ohio) 932, 938. Whether a bank was negligent in keeping a cashier who was known to some of the directors to have been speculating, but not to all of them, is a question of fact for the jury. *Sherwood v. Home Sav. Bank*, 107 N. W. (Iowa) 19.

member of the board and with his fellow members, knowledge acquired by him incidentally is not imputed to the bank.⁸⁵ But when he is acting in any special manner,⁸⁶ or is charged specially with communicating what is told him,⁸⁷ he must act like any other agent toward his principal.

17. Duty to Make Dividends.

The law prescribes when and how* directors shall make dividends. In no case are they justified in knowingly making a dividend that will impair the bank's capital.⁸⁸ Such action is a fraud, for, among other wrongful consequences, it is an impairment of the trust fund belonging to creditors.⁸⁹ And if

85 *Fairfield Sav. Bank v. Chase*, 72 Me. 226; *Farmers & Citizens' Bank v. Payne*, 25 Conn. 444; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Bank v. Davis*, 2 Hill (N. Y.) 451, 463; *First Nat. Bank v. Christopher*, 40 N. J. Law 435; *Atlantic State Bank v. Savery*, 82 N. Y. 291; *Continental Nat. Bank v. McGeoch*, 92 Wis. 286, 305; *Fidelity Co. v. Courtney*, 43 C. C. A. 331. If he knows of equities between maker and payee of a negotiable note, the bank is not bound if it acquired the note before maturity and for value. *Boston Com. Bank v. Heppes*, 23 Pa. Co. Ct. 447; *Bank v. Whitehead*, 10 Watts (Pa.) 397; *Custer v. Tompkins Co. Bank*, 9 Pa. 27; *Mapes v. Second Nat. Bank*, 80 Pa. 163.

86 *Fairfield Sav. Bank v. Chase*, 72 Me. 226.

87 *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394; *National Bank v. Norton*, 1 Hill (N. Y.) 575; *Fulton Bank v. New York & Sharon Canal Co.*, 4 Paige (N. Y.) 127; *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24; *U. S. Ins. Co. v. Shriver*, 3 Md. Ch. Dec. 381; *Boyd v. Chesapeake & Ohio Canal Co.*, 17 Md. 195, 210. But see *Custer v. Tompkins Co. Bank*, 9 Pa. 27 and *Bank v. Whitehead*, 10 Watts (Pa.) 397.

88 *Williams v. Brewster*, 117 Wis. 370. A dividend fraudulently made by directors when their bank is insolvent may be followed by creditors, or by their representatives, and recovered except from a bona fide purchaser or a creditor who has received them, *Hayden v. Thompson*, 17 C. C. A. 592, revg. 67 Fed. 273, the court citing *Finn v. Brown*, 142 U. S. 56, 70; *Wood v. Dummer*, 3 Mason (U. S.) 308; *Union Nat. Bank v. Douglass*, 1 McCrary (U. S.) 86, 90; *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281, 286; *Curran v. State*, 15 How. (U. S.) 304; *Sawyer v. Hoag*, 17 Wall. (U. S.) 610; *Hornor v. Henning*, 93 U. S. 228. See also *Gratz v. Redd*, 4 B. Mon. (Ky.) 194. By the statute of Oregon, directors who make dividends when their bank is insolvent are liable for its debts. It is a penal offense. *Patterson v. Thompson*, 86 Fed. 85.

89 *Gaffney v. Colvill*, 6 Hill (N. Y.) 567; *In re National Funds Ass. Co.*, 10 Ch. Div. (Eng.) 118; *Excelsior Petroleum Co. v. Lacey*, 63 N. Y.

a statute is disregarded requiring that ten per cent of the net profits earned during the period covered by a dividend must be retained until the surplus shall amount to twenty per cent. of the surplus, the dividend is void.⁹⁰ But they are not liable for making, through mistake or erroneous calculation, a dividend which, if paid, must be paid out of capital.⁹¹

On the other hand, a large discretion is given to them in withholding a dividend, though the profits of the bank should justify the making one.⁹² A stockholder has no case against directors for not declaring a dividend, or a larger one, unless some wrong motive is shown to lie behind their action.⁹³

18. Duty to Make Examinations and Reports.

(a.) A bank director is required to make some examination of his institution. How far he should go is not so clearly settled as it ought to be. Undoubtedly a statute or by-law requiring examinations must be observed in its spirit. Nor can a director plead long disregard of such a requirement in justification of his neglect. It is his duty to know the statute or by-law and to follow it; and not to ignore it.⁹⁴ And, if nei-

422; *Henry v. Vermillion R.*, 17 Ohio 187; *Osgood v. Laytin*, 3 Keyes (N. Y.) 521; *Scott v. Eagle Fire Co.*, 7 Paige (N. Y.) 198, 203; *Gratz v. Redd*, 4 B. Mon. (Ky.) 178, 194; *Hayden v. Thompson*, 17 C. C. A. 592.

90 *Lapsley v. Merchants' Bank*, 105 Mo. App. 98.

91 *Witters v. Sowles*, 31 Fed. 1; *Lexington & Ohio R. v. Bridges*, 7 B. Mon. (Ky.) 556; *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422. See *United States v. Britton*, 108 U. S. 199, 206. In the absence of contrary evidence directors are presumed to have acted lawfully in declaring a dividend. *Redhead v. Iowa Nat. Bank*, 127 Iowa 572.

92 *Reynolds v. Bank of Mt. Vernon*, 6 N. Y. App. Div. 62; *Williams v. Western Union Tel. Co.*, 93 N. Y. 162; *McNab v. McNab & Harlin Mfg. Co.*, 62 Hun (N. Y.) 18; *State of Louisiana v. Bank of Louisiana*, 6 La. 745.

93 *Seeley v. N. Y. Nat. Ex. Bank*, 8 Daly (N. Y.) 400, 403, *affd.* 78 N. Y. 608; *Hiscock v. Lacy*, 9 N. Y. Misc. 578, reviewing many cases. See *Scott v. Eagle Fire Co.*, 7 Paige (N. Y.) 198. "Should they without reasonable cause refuse to divide what is actually surplus profits, the stockholders are not without remedy." *Ibid* 203. *Hiscock v. Lacy*, 9 N. Y. Misc. 578, 597.

94 *Campbell v. Watson*, 62 N. J. Eq. 396, 415, 417, 421, 423.

ther exists, "by the common law of the land and the usages of banks, the duty of directors includes the occasional examination of the bank's accounts. That duty arises out of the duty of directors to take care of the property of the bank." Nor is that duty lessened by reason of independent examinations conducted by state or national officers. It may be fulfilled by personal examination or by the examination of an employe appointed for that purpose, provided the one thus selected is not required to pass on his own accounts. Nor can this examination be entirely left to a committee to whom has been entrusted the conduct of the bank. Some examination, independently of any made by the committee, is required of the directors as a body.⁹⁵

On the other hand, as the Kentucky Court of Appeals has correctly said, a bank director is not required to be either an expert, or a competent bookkeeper. But that court has gone further, declaring that a director is not required to do more in superintending the work of a cashier or bookkeeper than to see, in the absence of any reason for doubting his fidelity to the trust confided to him, that the weekly, daily or monthly statements made to the board correspond with the general balances upon the books.⁹⁶ If this is intended as a statement of a director's entire duty in the way of making examinations, it is too narrow compared with the view declared by other tribunals.⁹⁷

(b.) By positive law directors are required to make reports. By the national banking law if they fail to make them, or make false or deceptive ones, they are liable for the consequences.⁹⁸

Quite often they sign and make oath to reports prepared by the president, cashier, or other officer or several of them, the truth of which is almost wholly a matter of belief, and not of

95 *Williams v. McKay*, 40 N. J. Eq. 189, 201.

96 *Savings Bank v. Caperton*, 87 Ky. 306, 319.

97 *Campbell v. Watson*, 62 N. J. Eq. 396.

98 *Gerner v. Mosher*, 58 Neb. 135; *Gerner v. Yates*, 61 Neb. 100. See Chap. II, §§9-11.

real knowledge. Are they to be held guilty should the fact subsequently appear that the report was erroneous and misleading? They certainly are in all cases of intentional misrepresentation whether by concealment, suppression, changes of figures or other acts of the bank's condition. They must be regarded as having a proper comprehension of the consequences of their misdeed and justly liable to all who suffer from their conduct.⁹⁹

But when their act is untainted with any evil design, the courts part company on the consequences of their conduct. Though individuals make deposits or purchase stock relying thereon and eventually suffer, yet by some courts, as no wrong was intended, having signed in ignorance of the truth, they escape loss or punishment.¹ By other courts they are held liable.² By representing as true that of which they are consciously ignorant they commit fraud, for which they must answer. To this clear judicial utterance the same court has added that "a man is guilty of wilful falsehood when he asserts as of his own knowledge a matter of which he knows he is ignorant."³

An entire board, however, cannot be held liable for a false report unless they took part in its preparation; only those whose names are appended to it.⁴

99 *Heard v. Pictorial Press*, 182 Mass. 530. When one of two officers of a trust company produces a false minute to the examiner in the presence of the other who by his silence acquiesces in the exhibition, knowing of its falsity, both are guilty of exhibiting it under the statute. *State v. Twining*, 62 At. (N. J.) 402.

1 *Stebbins v. Edmands*, 12 Gray (Mass.) 203; *Felker v. Standard Yarn Co.*, 150 Mass. 264; *Pier v. Hanmore*, 86 N. Y. 95; *Uteley v. Hill*, 155 Mo. 232; *Mason v. Moore*, 76 N. E. (Ohio) 932. Directors are not liable for an erroneous published report caused by a state official. *Penfold v. Charlevoix Sav. Bank*, 103 N. W. (Mich.) 572.

2 *Gerner v. Mosher*, 58 Neb. 135; *Gerner v. Yates*, 61 Neb. 100; *Yates v. Jones Nat. Bank*, 105 N. W. (Neb.) 287; *Forbes v. Mohr*, 76 Pac. (Kan.) 827. See *Hauser v. Tate*, 85 N. C. 81, and *Tate v. Bates*, 118 N. C. 287.

3 *Gerner v. Yates*, 61 Neb. 100, 107; *Yates v. Jones Nat. Bank*, 105 N. W. (Neb.) 287; *Hexter v. Bast*, 125 Pa. 52; *Bullitt v. Farrar*, 42 Minn. 8.

4 *Gerner v. Mosher*, 58 Neb. 135; *Pier v. Hanmore*, 86 N. Y. 95.

The two classes who have suffered most from the preparation and publishing of misleading reports are depositors and stockholders;⁵ and the cases are quite numerous in which they have sought to recover from offending directors.

One more remark may be made in this connection. In some of these cases the action against directors has been founded on the common law of deceit; in others, on statutes.⁶ Their liability, therefore, has been measured by somewhat different rules, though the difference between them in most of the cases is not great.

19. Restrictions on Their Authority.

So far as positive law restricts the authority of directors, the way is clearly lighted, but this cannot be said of all the

5 Cases of depositors. *Killen v. Barnes*, 106 Wis. 546; *Forbes v. Mohr*, 76 Pac. (Kan.) 827; *Seale v. Baker*, 70 Tex. 283; *Kinkler v. Junica*, 84 Tex. 116; *Tate v. Bates*, 118 N. C. 287; *Solomon v. Bates*, 118 N. C. 311; *Caldwell v. Bates*, 118 N. C. 323; *Gerner v. Mosher*, 58 Neb. 135; *Stuart v. Bank*, 57 Neb. 569; *Schley v. Dixon*, 24 Ga. 273; *Prescott v. Haughey*, 65 Fed. 653; *Larsen v. James*, 1 Colo. App. 313; *Cowley v. Smyth*, 46 N. J. Law 380, which also see for mode of pleading in such actions.

Cases of stockholders. *Cazeaux v. Mali*, 25 Barb. (N. Y.) 578; *Cross v. Sackett*, 2 Bos. (N. Y.) 617; *Mabey v. Adams*, 3 Bos. 346; *Morgan v. Skiddy*, 62 N. Y. 319; *Huntington v. Attrill*, 118 N. Y. 365; *Houston v. Thornton*, 122 N. C. 365; *Ackerman v. Halsey*, 37 N. J. Eq. 356, 364; *Seale v. Baker*, 70 Tex. 283, 296; *Kinkler v. Junica*, 84 Tex. 116; *Bartholomew v. Bentley*, 15 Ohio 659; *Hubbard v. Weare*, 79 Iowa 678; *Salmon v. Richardson*, 30 Conn. 360; *Prewitt v. Trimble*, 92 Ky. 176; *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23; *Merchants' Nat. Bank v. Thoms*, 28 Ohio Week. Law Bull. 164, citing many cases; *Gerner v. Mosher*, 58 Neb. 135; *Johnson v. Goslett*, 3 C. B. (N. S.) 570; *Clarke v. Dickson*, 6 C. B. (N. S., Eng.) 453; *Peek v. Derry*, L. R. 37 Ch. Div. (Eng.) 541, 585. See also *Cochran v. United States*, 157 U. S. 286; *United States v. Allen*, 47 Fed. 696; *United States v. French*, 57 Fed. 382.

6 See *Yates v. Jones Nat. Bank*, 105 N. W. (Neb.) 287. "The liability of the directors of corporations for violations of their duty or breach of the trust committed to them, and the jurisdiction of courts of equity to afford redress to the corporation, and in proper cases to its shareholders, for such wrongs, exist independently of any statute . . . This jurisdiction has been continually exercised in England and in this country and is not of statutory origin." *Rapallo, J., Brinckerhoff v. Bostwick*, 88 N. Y. 52, 58, 59.

way beyond; and many of the older decisions restricting their authority no longer furnish true light to the modern traveler. Outside the statutes there are some well-known inhibitions. Directors cannot compensate themselves, however valuable may be their services; nor give an additional reward or compensation for a past service;⁷ they cannot release a stockholder from his subscription;⁸ nor condone the fraud of an officer;⁹ nor speculate with the funds of their bank;¹⁰ nor make a private profit in discharging their official duties;¹¹ nor donate the bank's property to any charitable, political or business purpose.¹²

20. Their Liability at Common Law.

As directors owe their official existence to positive law or statute, so by statute are their duties and liabilities chiefly defined and enforced. For fraudulent conduct they are liable, regardless of any statute, primarily to the bank,¹³ and secondarily to its creditors, whom they have defrauded.¹⁴ In many

7 *Brannin v. Loving*, 92 Ky. 370; *National Loan & Invest. Co. v. Rockland Co.*, 36 C. C. A. 370; *Accommodation L. & S. Fund Assn. v. Stonemetz*, 29 Pa. 534. See §12.

8 *Upton v. Tribilcock*, 91 U. S. 45; *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286; *Gill v. Balis*, 72 Mo. 424, 433.

9 *Hazard v. Durant*, 11 R. I. 195, 207. Except by a unanimous vote of the stockholders. *Ibid.*

10 *Redmond v. Dickerson*, 9 N. J. Eq. 507, 516.

11 *Farmers' & Mech. Bank v. Downey*, 53 Cal. 466; *Bain v. Brown*, 56 N. Y. 285, 288; *Koehler v. Black River Falls Iron Co.*, 2 Black (U. S.) 715.

12 *Union Bank v. Jones*, 4 La. Ann. 236; *Holt v. Winfield Bank*, 25 Fed. 812.

13 *Vose v. Grant*, 15 Mass. 505, 519; *Smith v. Hurd*, 12 Met. (Mass.) 371; *Bartholomew v. Bentley*, 15 Ohio 659; *Smith v. Poor*, 40 Me. 415; *Allen v. Curtis*, 26 Conn. 456, 460; *Winter v. Baker*, 34 How. Pr. (N. Y.) 183; *Watts's Appeal*, 78 Pa. 370; *Warner v. Hopkins*, 111 Pa. 328; *Zinn v. Mendel*, 9 W. Va. 580; *Minton v. Stahlman*, 96 Tenn. 98; *Deaderick v. Bank*, 100 Tenn. 457; *Gores v. Day*, 99 Wis. 276, 278.

"At common law every person undertaking to act for others is presumed as undertaking to act with integrity, diligence and skill." *Wolfe v. Simmons*, 75 Miss. 539, 541.

14 *Deaderick v. Bank*, 100 Tenn. 457; *Minton v. Stahlman*, 96 Tenn. 98; *Duffy v. Byrne*, 7 Mo. App. 417; *Fusz v. Spaunhorst*, 67 Mo. 256; *Gores v. Day*, 99 Wis. 276; *Warner v. Hopkins*, 111 Pa. 328.

states also they are liable to the bank, its stockholders, and creditors for negligence so great that it cannot be overlooked or excused even untainted with fraud.¹⁵ In other states, however, a distinction is drawn between fraudulent and non-fraudulent misconduct; and in the latter class of cases they are liable to the bank alone, and not to its creditors.¹⁶ This distinction must be noted at the outset, while its soundness is reserved for later consideration.¹⁷

21. Difficulty in Prescribing Rule of Duty and Liability.

The general rule of duty governing directors cannot be expressed in a rigid form. In the earlier days, when business methods were slower and simpler, the law maintained in a fairly satisfactory manner boundaries in the care which individuals were required to exercise while pursuing, under different conditions, their office or employment. But business methods have become so complex that many of these boundaries are disappearing. Between employers and employes, however, the courts are still spinning their distinctions concerning duty and liability with ever-increasing fineness, and thus enhancing the difficulty of both classes to know the law they are required to observe.

Though the courts no longer seek to measure the differences in care by the old-fashioned rules of slight, ordinary and great it is difficult in comparing one act with another to avoid altogether the use of these qualifying terms. One board of directors is more attentive, more dutiful than another; and in comparing their conduct some words expressing the distinctions between them must be used so long as these exist.

There are two ways of regarding the duty, care or attention required of a board of directors. One way is to set up an abstract standard or rule and apply this to the board of a particular bank, whose conduct is the subject of legal inquiry. The other way is to compare their conduct with that of an-

15 *Brinckerhoff v. Bostwick*, 88 N. Y. 52. See §27a.

16 *Minton v. Stahlman*, 96 Tenn. 98; *Deaderick v. Bank*, 100 Tenn. 457.

17 See §39.

other board which fulfills the legal requirements. The law employs both methods.

22. Minimum Rule. Ordinary Care.

Two abstract rules have long competed for judicial approval and application. The first of these was declared in 1829 by the Supreme Court of Louisiana, in *Percy v. Millaudon*,—the earliest case of bank misdirection judicially reviewed in this country. "The only correct mode of ascertaining whether there was fault," [in the director] says Justice Porter,¹⁸ who delivered the opinion of the court, "is by inquiring whether he neglected the exercise of that diligence and care which was necessary to a successful discharge of the duty imposed on him. That diligence and care must again depend on the nature of the undertaking. There are many things which, in their management, require the utmost diligence and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others, where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks from the nature of their undertaking fall within the class last mentioned, while in the discharge of their ordinary duties."

23. Maximum Rule. Prudence.

By the other rule directors must exercise the same degree of attention in conducting the business of their bank that is exercised by prudent men in conducting their own affairs.

¹⁸ *Martin* (N. S.) 68, 74; *Godbold v. Branch Bank*, 11 Ala. 191; *Sperling's Appeal*, 71 Pa. 11. In *Campbell v. Watson*, 62 N. J. Eq. 396, 408, *Pitney, V. C.*, remarked that "the various directions in which the care of directors of banking institutions should be exercised in order to protect against fraud and theft of employes have greatly increased in number and variety within fifty years; experience has developed modes of theft by such employes unknown and unthought of half a century ago, and these manifestations of ingenuity on the part of the thieves have been met by new safeguards on the part of the directors; so that what years ago would have been considered due diligence cannot be so considered to-day."

In a recent well-considered case the court thus stated the principle:¹⁹ "It is necessary for them to give the business under their care such attention as an ordinarily discreet business man would give to his own concerns under similar circumstances, and it is, therefore, incumbent upon them to devote so much of their time to their trust as is necessary to familiarize them with the business of the institution," and to supervise and direct its operations."

24. These Rules Regard Liability from Different Points of View.

The two rules regard the duty and liability of directors from different points of view. The first, or minimum liability rule, regards the matter from the director's side. He is indeed required to exercise a general supervision, and fulfill a few specific statutory requirements, but not much more. It is not expected that he will devote much time to the affairs of the bank, as he is rarely paid anything for his service, and generally is engaged in other and far more important business. It is not reasonable to expect that he will examine the books and other records, and without doing these things he cannot know much about the details of the bank's affairs and this is supposed to be known by all who do business with banking institutions.

The other rule regards the duty and liability of directors from the public side. This view is forcibly expressed by Jus-

¹⁹ Barch, Ch. J., *Warren v. Robison*, 19 Utah 289, 303. "I think the question in all such cases should and must necessarily be, whether the directors have omitted that care which men of common prudence take of their own concerns. To require more, would be adopting too rigid a rule, and rendering them liable for slight neglect; while to require less would be relaxing too much the obligation which binds them to vigilance and attention in regard to the interests of those confided to their care, and expose them to liability for gross neglect only—which is very little short of fraud itself." Vice Chancellor McCoun, *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513, 543. "Directors of banks are to be understood as contracting for reasonable capacity, skill and care in the discharge of their duties; and are consequently liable for the want of such capacity, skill and care to all persons who have been damaged thereby." *Wolfe v. Simmons*, 75 Miss. 539, 541.

tice Earl, in these words: "It seems to me that it would be a monstrous proposition to hold that trustees, intrusted with the management of the property, interests and business of other people, who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross inattention and negligence; and I have found no authority fully upholding such a proposition. It is true that authorities are found which hold that trustees are liable only for *crassa negligentia*, which literally means gross negligence; but that phrase has been defined to mean the absence of ordinary care and diligence adequate to the particular case. . . . Like a mandatary, to whom he has been likened, he is bound not only to exercise proper care and diligence, but ordinary skill and judgment. . . . These defendants voluntarily took the position of trustees of the bank. They invited depositors to confide to them their savings, and to intrust the safe-keeping and management of them to their skill and prudence. They undertook not only that they would discharge their duties with proper care, but that they would exercise the ordinary skill and judgment requisite for the discharge of their delicate trust."²⁰

Doubtless every court looks from both sides; but it is just as certain that its judgment is often deflected from the rules to the inculcated directors. The evidence against them is examined, an opinion is formed of their guilt or innocence, and then a color or modification, if necessary, is given to the rule, to fit it properly to the facts. The numerous penumbra that surround the rules above given are unquestionable proof of the working of the judicial mind in these controversies.

Again, construing violations of positive law, courts have again parted company over the question of intention or motive. If the violation was intentional and premeditated, then all the courts unite in holding the violators guilty; but if the

²⁰ Hun v. Cary, 82 N. Y. 65, 72, 73. This statement of the maximum rule has been more often quoted with approval than any other legal deliverance.

directors did not seriously consider the consequences of their misdoing, acted blindly or indifferently, some tribunals have overlooked their misdoing, notwithstanding that ancient and salutary rule whereby every man is supposed to regard the consequences of his own acts. If the courts themselves have too often ignored its application in dealing with offenders of the common law, there is less excuse for disregarding its application to offenders of plain, sound, living statutes.

The Percy case is a good illustration of the distinction. Even by the application of the minimum rule of liability, the directors on that occasion were condemned. But, in a subsequent case, in which their misdoing was again reviewed, the court put forth a clearer sound. "When the *error* is gross, the necessity for the act not apparent, and the consequences fatal, they must be held responsible, or the principle be left without protection."²¹

25. Rule of Comparative Local Duty.

The other rule may be called the local comparative one, and will be stated in the words of Chief Justice Paxson:²² "Not the ordinary care which a man takes of his own business, but the ordinary care of a bank director in the business of a bank.

²¹ 3 La. 568, 594.

²² Swentzel v. Penn Bank, 147 Pa. 140. In *Wheeler v. Aiken Co. Loan & Sav. Bank*, 75 Fed. 781, 784, Judge Brawley said: "The customs and methods of the community in which the business is done are, for such community, a standard of prudence and diligence by which the responsibility of bank officers and directors is to be tested; and if there is ground to believe that there has been a reasonable conformity to such methods and customs, and absolute good faith and honesty of purpose, it would be unjust to hold to a personal accountability for loans which subsequent events proved unwise." Judge Brawley goes further than Justice Paxson for he adds to the local standard of conduct, "absolute good faith and honesty of purpose." The comparative standard has been recently approved by the Supreme Court of Ohio. *Mason v. Moore*, 76 N. E. 932. In *Scott v. DePeyster*, 1 Edw. Ch. (N. Y.) 513, the directors justified their secretary's work by showing the usual course of a large number of the best business men in New York City, and that their own course was similar. On that ground Vice Chancellor McCoun acquitted the directors. Such a standard is definite enough, and doubtless in that case was properly applied. See *Campbell v. Watson*, 62 N. J. Eq. 396, 409.

Negligence is the want of care according to the circumstances, and the circumstances are everything considering the question."

By this rule the directorial standard of duty is the standard existing among the directors of other banks in the same city. In another part of his opinion the Justice remarked: "If the director [on trial] performed his duties as such in the same manner as they were performed by all other directors of all other banks in the same city, it could not be fairly said that he was guilty of gross negligence."

The flaw in this rule is apparent. What board in a great city is to serve as the measure or standard whereby to test the conduct of a director? In every large city the boards differ greatly in their interest, attendance, methods, and efficiency. In a few banks the attendance of their directors is large and regular, and a keen interest is taken by them in all its affairs. Perhaps they are large stockholders, and are fully impressed with the duties and liabilities of their office. In other banks their interest is slight, their attendance small and irregular, and the business, except a few statutory requirements, is entrusted to the managing officers.

This rule, therefore, as thus expressed, is singularly indefinite. If Justice Paxson had said that the standard to be applied to a director is that of the bank or banks whose directors take the deepest interest and devote the most attention to their management, then indeed the standard or measure would be definite and could be learned and applied. But since the directors in a large city vary so greatly in their interest, attendance and attention, the above standard of duty means very little, if anything, either in theory or application.

26. Unpaid Service Does Not Lessen Their Liability.

That directors do not personally gain anything when thus transgressing the law is no reason for releasing them from liability.²³ Voluntary, uncompensated personal service is no ex-

²³ *Charitable Corporation v. Sutton*, 2 Atkyns (Eng.) 405; *Trustees of Mutual Building Fund v. Bosseieux*, 3 Fed. 817, 838.

cuse for wrong-doing. It is true that when they defraud the bank for personal gain, they should be more severely punished, but when they knowingly violate the law, though with no fraudulent intent, they cannot plead innocence.

27. Elimination of Four Classes of Cases.

Having described the rules that apply to the conduct of directors the next step is to show how they have been applied. The storm-center can be more easily reached by cutting off four large classes of cases in which judicial decision has been essentially harmonious.

(a.) The first class includes all cases in which the conduct of directors is impregnated with fraud or bad faith. Fraud may have several forms, active and passive, open and secret. If a director is wantonly defrauding his bank there is no question concerning his liability. In a larger number of cases it assumes a less obvious form. Many men are of a pacific temperament and dislike to quarrel; they suffer physically and mentally by conflict. Then, too, for business reasons they may fear to incur the enmity of their associates; and are silent and inactive when they should be outspoken and vigilant in the discharge of their duty. So long as they are inattentive because their own business demands their time, they are not deemed neglectful; indeed, if their inattention is due simply to inertia, or disinclination to attend board meetings they are not regarded as within the fatal range of liability. In like manner when they travel abroad and for months do not meet with their associates, the law does not visit them with any penalty for their non-attendance.²⁴

When, however, they keep silent or remain away because they suspect or fear that the conduct of their bank is not proper, instead of coming and seeking to correct the board, then they incur the displeasure of the law; become in truth passive participants in the wrong-doing. So long as they honestly believe their associates are doing their duty, absentees cannot be

24 Briggs v. Spaulding, 141 U. S. 132. See §33.

holden on that ground, although, if they had come, they might have speedily unlearned their delusion. There is no smell of fraud on their garments so long as they have no wrongful suspicions. But the poison begins to work as soon as they suspect, fear or learn that the directors are doing wrong and preserve silence or remain away to escape learning more. In other words, as soon as a belief, fear or suspicion arises in their minds, it is their duty to become active and make an investigation to find out the truth or falsity of it; and if there be any foundation therefor, to strive for its correction, and, if failing, to resign. Not to do this is to become in law a participant in the fraud, and justly liable therefor.²⁵

25 Says Porter, J., in *Percy v. Millaudon*, 8 Martin (La., N. S.) 68, 75: "If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible." See *Briggs v. Spaulding*, 141 U. S. 132. In *Martin v. Webb*, 110 U. S. 7, 15, the court said: "Directors cannot in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers." In *Clews v. Bardon*, 36 Fed. 617, 621, Bunn, J., said: "The [national] banking act places their liability upon the true ground, and it stands about as it would in the like circumstances at the common law. In either case the director is bound to good faith. He must act honestly. He must not commit fraud, nor be privy to it, nor willfully shut his eyes, and abstain from making inquiries. If he has knowledge that an illegal transaction is to be enacted by the officers in charge, and consents to it, or connives at it, or willfully shuts his eyes, and permits it to be done, or is guilty of such gross and willful neglect of duty as amounts to bad faith, he will be held responsible."

For cases in which this rule has been declared or applied, see *Godbold v. Bank*, 11 Ala. 191; *Bank of St. Marys v. St. John*, 25 Ala. 566; *Schley v. Dixon*, 24 Ga. 273; *Dunn v. Kyle*, 14 Bush (Ky.) 134; *Brannin v. Loving*, 82 Ky. 370; *Fusz v. Spaunhorst*, 67 Mo. 256; *Delano v. Case*, 121 Ill. 247; *Robinson v. Smith*, 3 Paige (N. Y.) 222; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Cross v. Sackett*, 2 Bos. (N. Y.) 617, 645; *Spering's Appeal*, 71 Pa. 11; *Marshall v. Farmers & Mechanics' Sav. Bank*, 85 Va. 676; *Minton v. Stahlman*, 96 Tenn. 98; *Bartholomew v. Bentley*, 15 Ohio 659; *Seale v. Baker*, 70 Texas 283; *Solomon v. Bates*, 118 N. C. 311; *Tate v. Bates*, 118 N. C. 287; *Briggs v. Spaulding*, 141 U. S. 132; *Robinson v. Hall*, 12 C. C.

(b.) Another approach toward the center may be made from the opposite side. Directors who seek to do their duty are not responsible for mistakes of fact.²⁶ If before employing a cashier they investigate his fitness, mental and moral, and are satisfied of his competency, they are not responsible should he prove to be otherwise. But if, after discovering his incompetency, or unfitness, they continue him in office, unless temporarily while trying to find another, they are liable for the consequences.²⁷ Likewise, if they make mistakes in lending money and incur losses, after exercising their best judgment, they are not liable.²⁸ In like manner they are not responsible for mistakes of law, especially after seeking competent advice.²⁹

A. 674; *Cooper v. Hill*, 36 C. C. A. 402; *Prescott v. Haughey*, 65 Fed. 653; *Trustees of Mutual Building Fund v. Bossieux*, 3 Fed. 817. The unauthorized action of directors in withholding assent to the transfer of stock to a purchaser shortly before its insolvency is not evidence of fraud. *Penfold v. Charlevoix Sav. Bank*, 103 N. W. (Mich.) 572.

²⁶ *Godbold v. Bank*, 11 Ala. 191; *Smith v. Prattville Mfg. Co.*, 29 Ala. 503; *United Society of Shakers v. Underwood*, 9 Bush (Ky.) 609; *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23; *Dunn v. Kyle*, 14 Bush (Ky.) 134; *Ray v. Bank*, 10 Bush (Ky.) 344; *Savings Bank v. Caperton*, 87 Ky. 306; *Jones v. Johnson*, 86 Ky. 530; *Percy v. Millaudon*, 8 Martin (La., N. S.) 68; *Vance v. Phoenix Ins. Co.*, 4 Lea (Tenn.) 385; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Foster v. Essex Bank*, 17 Mass. 479; *Ackerman v. Halsey*, 37 N. J. Eq. 356, 363; *Hodges v. New England Screw Co.*, 1 R. I. 312; *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513; *Manhattan Co. v. Lydig*, 4 Johns. (N. Y.) 377; *Marshall v. Farmers' & Mech. Sav. Bank*, 85 Va. 676; *Solomon v. Bates*, 118 N. C. 311; *Turquand v. Marshall*, L. R. 4 Ch. App. (Eng.) 376, 386; *Overend, Gurney & Co. v. Gurney*, 4 Ch. App. 701; *Giblin v. McMullen*, 2 P. C. 317; *Spering's Appeal*, 71 Pa. 11; *McCormick v. Seeberger*, 73 Ill. App. 87, *affd.* 178 Ill. 404; *Mann v. Richardson*, 66 Ill. 481.

²⁷ *United Society of Shakers v. Underwood*, 9 Bush (Ky.) 609; *Ray v. Bank*, 10 Bush 344; *Graves v. Lebanon Nat. Bank*, 10 Bush 23, 30; *Foster v. Essex Bank*, 17 Mass. 479; *Scott v. National Bank of Chester Valley*, 72 Pa. 471; *Giblin v. McMullen*, L. R. 2 P. C. (Eng.) 317.

²⁸ *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513; *Spering's Appeal*, 71 Pa. 11; *Witters v. Sowles*, 31 Fed. 1.

²⁹ *Vance v. Phoenix Ins. Co.* 4 Lea (Tenn.) 385; *Hodges v. New England Screw Co.*, 1 R. I. 312; *Godbold v. Branch Bank*, 11 Ala. 191; *Har-*

In this category may be placed a large number of delinquencies of a minor kind that do not affect their integrity or injure the bank, which are not in any way vital to its successful operation, for example, the failure, through inattention and not design, to make reports, or reports less complete than the law requires.

Should an error of law be put in the same category with an error of judgment? An error of the law springs from ignorance and may be prevented by more study. An error of judgment concerning the credit of a borrower cannot always be so easily prevented, for the obvious reason that the facts on which the judgment is founded are more obscure.

It is not quite correct to classify losses arising from an error of judgment concerning the law in the same category with errors of judgment pertaining to facts. A director can, in many cases, ascertain the law by diligent inquiry; in these, therefore, should he not be held liable for losses occasioned by his neglect to know it? Such a loss is not caused primarily by an error, but by a failure to know the law which it was his duty to understand. On the other hand, a director may err with respect to the credit that ought to be given to a borrower, notwithstanding careful inquiry, because the facts pertaining to his methods of business and his wealth, and the like are so obscure.

Nevertheless, a qualification must be added to the stricter principle that applies to directors concerning their duty to know the law. It is true, as every legal student painfully knows, that many principles of law are obscure, and, notwithstanding the most intelligent and energetic efforts to acquire and apply them accurately, mistakes are made. Such mistakes

man v. Tappenden, 1 East (Eng.) 535. But see *Marshall v. Farmers & Mechanics' Sav. Bank*, 85 Va. 676, 683.

In *Bank v. Hill*, 56 Me. 365, a board had discounted worthless paper and the court thus remarked concerning their conduct: "If they knew the character of the paper discounted, and its utter worthlessness, they were guilty of gross fraud upon the stockholders in discounting such paper. If they did not know its character, they were guilty of gross neglect in not making the inquiries, which they were bound officially to make."

may be truly termed errors of judgment from which directors should be absolved.

(c.) A third class of cases may be cut off, specific violations of positive law.²⁷ The conduct of directors on many of these occasions is without a stain of fraud, but they are just as clearly liable for knowingly and deliberately violating a clear, positive law whereby others, confiding in their honesty and loyalty, have suffered.

Thus in nearly every state usury laws exist which limit the discretion of banks in lending money. The directors, for the sake of enhancing the gains of their bank, determine to disregard the inhibition. They commit no moral fraud, and have not the slightest intention of so doing; the law, standing in the way of greater profit, is openly defied. A higher rate is charged, but a greater risk is taken, and the loan proves a loss. Had they obeyed the law and been content with the legal rate, they would have found better security, at all events they would have been within the pale of legal protection. By disregarding it, though with no thought of personal gain distinct from the general gain to the bank, a loss is incurred. Why should they not be held responsible for the loss? They have violated a law which was enacted to prevent them from taking an excessive risk, why should they not be held accountable for the disaster? Their conduct was not an error of judgment, not a mistake, but an open and wilful, though honest, defiance of the law, which has brought loss in its train. Surely it is proper to visit them with punishment for their deed.

Another illustration of the same kind is the lending to an individual of more than a prescribed part of the bank's capital.³⁰ The law was wisely designed, no one has the temerity to say it ought to be changed; it was adopted in the interest of sound conservative banking, to protect directors from yielding to the importunities of their friends and from giving too free rein to

³⁰ By the national banking law directors cannot lend more than one-tenth of the bank's capital and surplus to a single borrower. See Chap. VII. §23, note 91.

their own judgment. Surely if they violate it and losses follow, it is proper to hold them responsible for the violation.³¹

Other specific violations are the sale of a special deposit;³² the payment of dividends out of capital;³³ the making of investments or loans prohibited by law;³⁴ the discounting of paper known to be worthless;³⁵ beginning business without the legal amount of capital;³⁶ accepting unauthorized securities in payment of stock;³⁷ creating an indebtedness beyond the capital stock, or beyond a prescribed amount;³⁸ the payment of an illegal tax;³⁹ neglect to appoint an examining committee required by law;⁴⁰ or to hold meetings prescribed by statute or by-laws;⁴¹ and the receiving of deposits by directors when their bank was in an insolvent condition.⁴²

31 *Cockrill v. Cooper*, 57 U. S. App. 576, 588, revg. 78 Fed. 679, and 58 U. S. App. 648; *Stephens v. Overstolz*, 43 Fed. 465; *Witters v. Sowles*, 43 Fed. 405; *Witters v. Sowles*, 31 Fed. 1; *National Bank v. Wade*, 84 Fed. 10; *Clews v. Bardon*, 36 Fed. 617. The remedy is in equity. *Welles v. Graves*, 41 Fed. 459. See §35, note 61. Directors cannot be held in damages from making an excessive loan unless a loss resulted thereby to the bank. *Emerson v. Gaither*, 64 At. (Md.) 26.

32 *United Society of Shakers v. Underwood*, 9 Bush (Ky.) 609.

33 *Solomon v. Bates*, 118 N. C. 311; *Gaffney v. Colvill*, 6 Hill (N. Y.) 567; *United States v. Britton*, 108 U. S. 199, 206; *Hayden v. Thompson*, 36 U. S. App. 361. See *Houston v. Thornton*, 122 N. C. 365.

34 *Dodd v. Wilkinson*, 42 N. J. Eq. 647. See *Wilkinson v. Dodd*, 40 N. J. Eq. 123 and 41 N. J. Eq. 566; *Williams v. McKay*, 46 N. J. Eq. 25; *Joint Stock Discount Co. v. Brown*, 8 Eq. Cases (Eng.) 381; *Dunn v. Kyle*, 14 Bush (Ky.) 134; *Cooper v. Hill*, 36 C. C. A. 402.

35 *Savings Bank v. Caperton*, 87 Ky. 306, 322, and cases cited. A loan to a borrower known by the directors to be insolvent is clearly improper. *Stone v. Rottman*, 183 Mo. 552.

36 *Schley v. Dixon*, 24 Ga. 273; *Trust Co. v. Floyd*, 47 Ohio St. 525. The creation of an increase of the capital stock based on a fictitious value of the bank's assets and on notes that were not to be paid is another specific violation. *Cockrill v. Abeles*, 86 Fed. 505.

37 *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398.

38 *Stone v. Chisolm*, 113 U. S. 302; *Hornor v. Henning*, 93 U. S. 228; *Brannin v. Loving*, 82 Ky. 370; *White v. How*, 3 McLean (Fed.) 111; *Hargroves v. Chambers*, 30 Ga. 580; *Banks v. Darden*, 18 Ga. 318.

39 *Dodge v. Woolsey*, 18 How. (U. S.) 331.

40 *Campbell v. Watson*, 69 N. J. Eq. 396.

41 *Marshall v. Farmers' & Mech. Sav. Bank*, 85 Va. 676. "A director

(d, 1.) A fourth class of cases may be cut off, those relating to the usurpation, or neglectful exercise of authority. This may spring from statute, or the common law, or both. If directors do not possess the authority they exercise they are clearly guilty of usurpation, save in those cases in which they honestly suppose, and with some reason, that in exercising it, they are within the law.⁴³ On the other hand, directors who are personally required to perform a specific duty, cannot del-

is expected to attend the meeting of the board with reasonable regularity." *Stone v. Rottman*, 183 Mo. 552, 574.

42 Chap. VI. §§6, 7. "Bank directors who know of the insolvency of the corporation, and yet hold it out to the world as worthy of credit, and at the same time appropriate its assets to their own advantage unquestionably render themselves individually liable to all persons injured by their misconduct." *Tarral, J., Wolfe v. Simmons*, 75 Miss. 539, 541. Directors are personally liable for a deposit made after a suspension of payments, on the faith of a circular that such deposits would be kept subject to their order, which was subsequently taken by the bank's receiver. *Miller v. Howard*, 95 Tenn. 407.

43 "The directors cannot divest themselves of the duty of general supervision and control by committing this duty to [the cashier], but they properly may intrust to him all the discretionary powers which usually appertain to the immediate management of its business." *Wallace, Cir. J., Warner v. Penoyer*, 33 C. C. A. 222, 226. In the *Penoyer* case the board confided to a finance committee the duty of lending the bank's money, who, in turn, sought to relieve themselves from duty by confiding it wholly to the cashier who, in due time, wrecked the bank. The court decided not to hold the board for delegating their duty to the finance committee, but held the members of that committee responsible for delegating their duty to the cashier. The court remarked that the board was justified in supposing that the committee would attend to these duties instead of shirking them and leaving all to a single officer. "There can be no doubt that if the directors or officers of a company do acts clearly beyond their power, whereby loss ensues to the company, or dispose of its property or pay away its money without authority, they will be required to make good the loss out of their private estates. *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381; *Flitcroft's Case*, L. R. 21 Ch. Div. 519; *Franklin Ins. Co. v. Jenkins*, 3 Wend. (N. Y.) 130. This is the rule where the disposition made of money or property of the corporation is one either not within the lawful power of the corporation, or, if within the power of the corporation, is not within the power or authority of the particular officer or officers." *Pinney, J., North Hudson B. & L. Assn. v. Childs*, 82 Wis. 460, 475. See *Oakland Bank v. Wilcox*, 60 Cal. 126.

egate its performance to others without incurring liability. Thus, in many states directors are justified in delegating their authority to lend the bank's money to the managing officers;⁴⁴ in other states they must still continue to perform this duty themselves.⁴⁵ Where the inhibition prevails, they are as clearly guilty of negligence in not performing this duty as in not signing reports, holding meetings or fulfilling other positive requirements of the law.

(d, 2.) Suppose a duty is rightfully delegated by the board to a managing officer, and he in performing it violates the statute, are the directors liable? Thus, a cashier was rightfully authorized to make loans, but in exercising this authority he violated the law forbidding his bank from lending more than one-tenth of its capital to a borrower. The directors were held not liable for the cashier's deliberate violation of the law.⁴⁶ Though this decision may be free from criticism, the principle cannot be founded thereon, that in all cases in which directors can rightfully authorize a managing officer to make loans, they are not responsible for his conduct. They still have a supervisory power to perform, it is the duty of the managing officer to report the loans he has made to them and thus they know, or ought to know, what he is doing. As Vice Chancellor Pitney has so well said, they cannot free themselves entirely from responsibility by a delegation of their duties to others.⁴⁷ There is clearly a limit to this principle of non-liability of directors for infractions of positive law by those

44 In *Warner v. Penoyer*, 33 C. C. A. 222, 225, the court said: "The directors of a national banking association are authorized to appoint a cashier and delegate to him all the usual powers of such an officer, including the discounting of notes." *Land Credit Co. v. Lord Fermoy*, L. R. 5 Ch. App. (Eng.) 763. See §32 and Chap. IX, §20.

45 *Union Nat. Bank v. Hill*, 148 Mo. 380; *Gibbons v. Anderson*, 80 Fed. 345; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Percy v. Millaudon*, 8 Martin (La.) 68; *Wilkinson v. Dodd*, 42 N. J. Eq. 234, 250, *affd.* *Ibid* 647; *Houston v. Thornton*, 122 N. C. 365; *Oakland Bank v. Wilcox*, 60 Cal. 126.

46 *Clews v. Bardon*, 36 Fed. 617.

47 *Campbell v. Watson*, 62 N. J. Eq. 396.

whom they have appointed to manage the business of their bank. Surely they ought to be held for violations that were known, or would have been known, had they attended to their duties.⁴⁸ The rule, therefore, in this class of cases is, directors are liable for violating the statutes, and also for violations by those under their authority when they knew, or ought to have known, what they were doing.⁴⁹

28. Harmonious Application of Law in These Four Classes of Cases.

In applying the rules of duty and liability on the occasions described not much difficulty has arisen. When fraud has existed, it has generally been discovered and punished. When directors have erred in employing officers or in making loans, or mistaken the law, the courts have not been greatly troubled in learning the truth. When directors have violated the statutes, whatever their intention, in most cases the violations were too plain to be ignored. Appointed to execute the law, the courts have not hesitated to enforce a plain command.

29. They Are Cases of Super-Negligence.

The four classes of cases above mentioned may be considered from another point of view. Though everywhere regarded as cases of negligence, they possess another character. When committing frauds, directors are just the opposite from negligent; they are too active. Indeed, the cases of real negligence do not relate to frauds, to violations of law, to usurpations of authority, but rather to the mode or manner of exercising authority. Negligence among bank directors is, in truth, chiefly neglect—neglect to do the things required of them, or to do them in a proper manner.

30. Only Cases of Real Negligence Left for Consideration.

Eliminating all questions of fraud, mistake, and specific violations of law, the cases that cover the remaining central

⁴⁸ *Gibbons v. Anderson*, 80 Fed. 345.

⁴⁹ In *Brannin v. Loving*, 82 Ky. 370, the directors did not know that the president had violated the law.

ground are not so numerous perhaps as many imagine. It is easy enough to put them into classes relating to loans,⁵⁰ employment of officers,⁵¹ examination of books, and the like,⁵² but nothing would be gained by such a classification. The same inquiry runs through them all; how, or in what manner was the authority of the directors exercised? Were they negligent or not in making the loan, in employing the officer, in retaining him after learning of his unfitness, in not examining the books more frequently, or more thoroughly? As this inquiry is first, one of fact; and afterward, the application of the rule of duty thereto,—the answer in one case is not conclusive in another; for the facts are never quite the same.

Nevertheless, we may inquire, cannot a general rule of duty be formulated to apply to directors, and not leave them entirely to the judgment of the court in each particular case? A negative conclusion has been declared by the Supreme Court of the United States. If a director is guilty of fraud, or of violating a statute, or of exceeding his authority, he is clearly liable. Beyond this he may be liable for something more, but precisely what cannot be told until the matter comes before the court for determination.

It is true that this was another five to four decision, and the minority, unwilling to confess their inability to prescribe a rule of conduct for directors, declared that "as to the degree of diligence and the extent of supervision to be exercised by directors, there can be no room for doubt under the authorities. It is such diligence and supervision as the situation and the nature of the business requires. Their duty is to watch over and guard the interests committed to them. In fidelity to their oaths, and to the obligations they assume, they must do all that

⁵⁰ *Percy v. Millaudon*, 8 Martin (La. N. S.) 68; *Brannin v. Loving*, 82 Ky. 370.

⁵¹ *United Society of Shakers v. Underwood*, 9 Bush (Ky.) 609.

⁵² Directors are not liable for not detecting fraudulent entries made by their cashier in the bank books extending through a period of nine years. *Savings Bank v. Caperton*, 87 Ky. 306.

reasonably prudent and careful men ought to do for the protection of others intrusted to their charge.”⁵³

The Supreme Court of the United States is not the only tribunal maintaining this despairing opinion. Recently, the Supreme Court of New Hampshire ⁵⁴ has declared that “the decisions in other jurisdictions, attempting to establish inflexible rules whereby it shall be settled that the existence of certain facts establishes a charge of negligence as a matter of law, are not entitled to the weight to which they would be if such views of the law prevailed in this state. The question of negligence, being here regarded as one of fact, is to be determined in the light of all the circumstances peculiar to the particular case.” It was accordingly held that the directors of a bank were not liable for the defalcations of its cashier which occurred after learning of his indulgence in prior unsuccessful speculations. While the courts elsewhere, perhaps without exception,⁵⁵ have held directors liable for the evil consequences attending the retention of a cashier or other officer after they

53 *Briggs v. Spaulding*, 141 U. S. 132, 170. In this case, the court declared that the directors must exercise supervision, but this was precisely what they did not do, yet by the majority were held not responsible. See valuable note on the liability of directors for negligence in 12 C. C. A. 680.

54 *Ricker v. Hall*, 69 N. H. 592, 595. In *Horn Silver Mining Co. v. Ryan*, 42 Minn. 196, 199, the court said: “The plain and obvious rule is that directors impliedly undertake to use as much diligence and care as the proper performance of the duties of their office requires. What constitutes a proper performance of the duties of a director is a question of fact, which must be determined in each case in view of all the circumstances. The character of the company, the condition of its business, the usual method of managing such companies, and all other relevant facts must be taken into consideration.”

55 In *Scott v. National Bank of Chester Valley*, 72 Pa. 471, 480, the court well said: “No officer in a bank, engaged in stock-gambling, can be safely trusted, and the evidence of this is found in the numerous defaulters, whose peculations have been discovered to be directly traceable to this species of gambling. . . . Any evidence of stock-gambling, or dangerous outside operations, should be visited with immediate dismissal.” A similar view was taken in *Preston v. Prather*, 137 U. S. 604. See *Cutting v. Marlor*, 78 N. Y. 454, and *Kitchens v. Teasdale Commission Co.*, 79 S. W. (Mo. App.) 1177.

knew he was speculating, the New Hampshire decision is a not unexpected deliverance for a court which applies solely its own light to the facts in each case.

The rule of duty and liability declared in *Briggs v. Spaulding* has been reluctantly followed by the lower federal courts in subsequent cases. The remarks on several occasions clearly reveal that their real opinion was quite different from that which they were required to adopt and apply.⁵⁶ Remembering, therefore, that four of the nine judges who decided the case entertained a different view, that most of the federal judges in subsequent cases have followed it from necessity and not from conviction of its soundness, that with very few exceptions it has encountered the disapproval of the state tribunals, is it unreasonable to suppose that the question would receive the same answer should it ever be reviewed?

31. Application of the Two Rules of Duty to Them.

In the central zone, therefore, is left a class of cases of pure negligence. They are not tainted with fraud, they are not excusable mistakes, they are not violations either intentional or unintentional of any statutory requirement. They fall into two divisions. In the first are included the cases in which the negligence of directors, while stopping outside the door of fraud, is gross and without excuse. In the second class of cases, the negligence is not so great.

The negligent directors included in the second division are not regarded culpable by any courts; the directors included in the first division are regarded guilty by some courts, and not by others. With respect to these the courts are in hopeless conflict. Those which relieve directors apply solely either the minimum standard of duty and liability above described; or in addition to this rule, exercise an independent judgment based on the facts in each case, as was done by the supreme federal court in *Briggs v. Spaulding*. The courts which condemn

⁵⁶ *Warner v. Penoyer*, 33 C. C. A. 222, 228; *Trustees of Mutual Building Fund & Sav. Bank v. Bosseix*, 3 Fed. 817; *Robinson v. Hall*, 12 C. C. A. 674.

them apply the rule of liability laid down by Justice Earl. This rule, holding directors liable for gross negligence, even though untainted by fraud, commands much wider assent and is believed to be more salutary in its operation.⁵⁷

57 Cases in which the maximum rule has been applied.

Alabama.—*Smith v. Prattville Mfg. Co.*, 29 Ala. 503.

Illinois.—*Delano v. Case*, 17 Ill. App. affd., 121 Ill. 247.

Indiana.—*Coddington v. Canaday*, 157 Ind. 243.

Kansas.—*Sweet v. Montpelier Sav. Bank*, 69 Kan. 641, 650, second trial, 84 Pac. 542.

Kentucky.—*United Society of Shakers v. Underwood*, 9 Bush 609; *Jones v. Johnson*, 10 Bush 649; *Ray v. Bank*, 10 Bush 344; *Dunn v. Kyle*, 14 Bush 134; *Brannin v. Loving*, 82 Ky. 370; *Jones v. Johnson*, 86 Ky. 530; *Savings Bank v. Caperton*, 87 Ky. 306.

Minnesota.—*Horn Silver Mining Co. v. Ryan*, 42 Minn. 196, citing *Hun v. Cary*, 82 N. Y. 65.

Michigan.—*Commercial Bank v. Chatfield*, 121 Mich. 641, and 127 Mich. 407.

Missouri.—*Union Nat. Bank v. Hill*, 148 Mo. 380; *Stone v. Rottman*, 183 Mo. 552, 580.

New Jersey.—*Ackerman v. Halsey*, 37 N. J. Eq. 356; *Dodd v. Wilkinson*, 42 N. J. Eq. 647, affg. id. 234; *Williams v. McKay*, 46 N. J. Eq. 25, 56; *Williams v. McKay*, 40 N. J. Eq. 189, revg. 38 N. Y. Eq. 373; *Campbell v. Watson*, 62 N. J. Eq. 396.

New York.—*Cassidy v. Uhlmann*, 170 N. Y. 505; *Hun v. Cary*, 82 N. Y. 65; *Bloom v. National Sav. & Loan Co.*, 81 Hun (N. Y.) 120, 123; *Hanna v. Lyon*, 179 N. Y. 107.

Nebraska.—*Gerner v. Mosher*, 58 Neb. 135.

North Carolina.—*Townsend v. Williams*, 117 N. C. 330; *Tate v. Bates*, 118 N. C. 287; *Solomon v. Bates*, 118 N. C. 311.

Tennessee.—*Shea v. Mabry*, 1 Lea 319, 342; *Hume v. Commercial Bank*, 9 Lea 728; *Minton v. Stahlman*, 96 Tenn. 98; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Deaderick v. Bank*, 100 Tenn. 457, 463.

Texas.—*Seale v. Baker*, 70 Texas, 283.

Virginia.—*Marshall v. Farmers & Mechanics' Sav. Bank*, 85 Va. 676.

Utah.—*Warren v. Robison*, 19 Utah 289.

Cases in which minor rule of liability was applied:

Louisiana.—*Percy v. Millaudon*, 8 Martin (N. S.) 68.

Maryland.—*Fisher v. Parr*, 92 Md. 245; *Booth v. Robinson*, 55 Md. 419.

Ohio.—*Mason v. Moore*, 76 N. E. 932, see also *Meisse v. Loren*, 6 Ohio Dec. 253.

Pennsylvania.—*Spering's Appeal*, 71 Pa. 11; *Swentzel v. Penn Bank*, 147 Pa. 140; *Maisch v. Saving Fund*, 5 Phila. 30.

Wisconsin.—*Killen v. Barnes*, 106 Wis. 546, 574; *North Hudson B. & L. Assn. v. Childs*, 82 Wis. 460.

Federal.—*Briggs v. Spaulding*, 141 U. S. 132.

32. Narrowing of Directors' Responsibility.

There is another phase of the subject worthy of notice, the narrowing of the responsibility of directors by reason of the extension of the authority of managing officers. Of late years, in the large cities especially, the lending of a bank's money has been almost wholly done by a committee, or more often by the president, or by two or three officers. The quicker methods of modern business demand this change. In imposing this most important duty on the managing officer, the directors in almost every state have the sanction of law. Formerly, this was the paramount duty of directors. In this direction, therefore, to the extent that their duty has been legally lightened, their corresponding liability has disappeared.⁵⁸ But directors cannot relieve themselves entirely from responsibility by thus delegating their duties to a manager or committee. When they are charged with specific duties, these, as we have seen, must be performed. They are personal and cannot be transferred. How far they can go depends on the statute or charter which is the basis of the bank's existence and authority.

33. Duty of Non-Resident and Absent Directors.

Lastly, may be considered the question, what judgment may

⁵⁸ See *Warner v. Penoyer*, 33 C. C. A. 222, 225. "A board of directors has authority, acting as and for the corporation, to delegate to subordinate officers and agents, or to a committee of their own number, the power to perform any act in the course of the business of the corporation which they themselves can legally perform, even though the performance of the act may involve the exercise of the highest judgment and discretion, provided there is express authority given therefor, or it is implied from usage or from the necessities in the management of the corporation." *McSherry, Ch. J., Maryland Trust Co. v. National Mech. Bank*, 63 At. (Md.) 70, 80. In Arkansas, under a statute declaring that directors are liable who intentionally neglect their statutory duties, they cannot transfer them to the president, believing that he is honest and competent. No matter how honest and capable the president is, the directors have their duties to perform, and cannot fail to perform them because their confidence in the president renders them unnecessary in their opinion. *Fletcher v. Eagle*, 86 S. W. (Ark.) 810. See §27 d 1.

be visited on absent directors? If one is ill his non-attendance is excused; furthermore, a bank may give a leave of absence to a director who is sick, though he be the president, expecting or hoping that he will recover and resume his duties. Not infrequently directors are elected for the purpose of strengthening the bank, gaining business, who live far away and are not expected to aid their associates by their presence and advice, or only on rare occasions. We are now approaching dangerous ground. For, if all were excused because they were too busy to attend, the direction of the bank would pass entirely to the president, or a few of the leading officers. It is not proper for directors to confide entirely the direction of their bank to its managers, however competent and worthy of confidence they may be, but to what extent attendance is a positive duty that cannot be neglected without rendering the absentee liable for the ill consequences is an open question and perhaps must always remain open for specific answer.⁵⁹ Surely, if one were absent because he scented wrong-doing and did not wish either

⁵⁹ *Briggs v. Spaulding*, 141 U. S. 132. See *North Hudson B. & L. Assn. v. Childs*, 82 Wis. 460, 478, and *Wheeler v. Aiken Co. Loan & Sav. Bank*, 75 Fed. 781, 782.

In *Warren v. Robison*, 19 Utah, 289, Bartch, Ch. J., says: "A director is not responsible for acts committed, transactions made, or losses incurred before he became a member of the board, or for any act of the board alone in his absence and without his knowledge and assent." This is the English rule. In *re Cardiff Savings Bank*, L. R. 2 Ch. Div. (Eng.) 100; In *re Denham & Co.*, 25 Ch. Div. (Eng.) 752; *Land Credit Co. v. Lord Fermoy*, L. R. 5 Ch. App. (Eng.) 763. In *Banks v. Darden*, 18 Ga. 318, absence and dissent when present did not relieve the directors. And in the recent case of *Houston v. Thornton*, 122 N. C. 365, 373, the Supreme Court of North Carolina said: "There is no principle of law or morals that will permit the selection of non-resident directors of good character, whose names shall be a pledge of honest management upon which the public shall make deposits and buy the stock of the bank, and then when the crash comes will excuse such directors from liability because, being non-residents, they could not give proper attention to their duties, and by private arrangement it was agreed that they should not be required to do so. Such arrangement, if it had been shown, would not have released them from their duties as prescribed by Act of Congress, nor from their common law liability for negligence or fraud." In one of the latest cases the Supreme Court of Missouri said: "A director is expected to attend the meetings of the board

to participate or to oppose his associates, he could hardly defend himself in a meeting of stockholders, or a court of law.

34. Effect of Resigning and of Immediate Re-Election.

A director who resigns, buys property of the bank shortly afterward, and is then re-elected a director, is liable therefor as if he had served continuously.⁶⁰

35. Director is Liable Only for His Own Negligence. Minority.

A director is liable only for his own negligence, and not for that of his co-directors,⁶¹ or those of a former period.⁶² To hold him liable he must be charged personally, and the allegation must be proved.⁶³ Nor can a director be held severally for the act of a majority of the board, though he voted with them;

with reasonable regularity, and to exercise a general supervision and control." *Stone v. Rottman*, 183 Mo. 552, 574.

"It is no doubt true that directors owe to their constituents the duty of keeping the board full by promptly filling vacancies as they occur, and that for the reason that the shareholders are entitled to the benefit of the experience and advice of all the members of a full board in the transaction of its business. When the directors violate this duty, there may be sound reasons for holding that they should not be allowed to take any advantage as against the shareholders of acts or resolutions passed when a full board was not in existence." *Beatty, Ch. J., Potter v. Lassen Co. Land Co.*, 127 Cal. 261, 269. Directors who are elected, but do not accept, are not liable. *Maisch v. Savings Fund*, 5 Phila. 30; *Hume v. Commercial Bank*, 9 Lea (Tenn.) 728.

⁶⁰ *Millsaps v. Chapman*, 76 Miss. 942.

⁶¹ *Briggs v. Spaulding*, 141 U. S. 132; *Fisher v. Graves*, 80 Fed. 590; *Chatfield v. Commercial Bank*, 121 Mich. 641, 646; *Franklin Fire Ins. Co. v. Jenkins*, 3 Wend. (N. Y.) 130.

"A corporation may be bound by the act of its constituted officers, but when it is sought to charge officers individually for ultra vires acts, or for misconduct, it is only those who participate therein who are liable in the absence, of course, of conspiracy or indirect participation." *Gerner v. Mosher*, 58 Neb. 135, 145. A bank director who is not acting as a director in obtaining the discount of notes belonging to his father, for example, cannot be held liable for persuading the bank to violate the ten per cent. limitation imposed by the federal statute. *Hicks v. Steel*, 142 Mich. 292.

⁶² *Windham Prov. Institution v. Sprague*, 43 Vt. 502. See *Solomon v. Bates*, 118 N. C. 311, 319.

⁶³ *Fisher v. Graves*, 80 Fed. 590.

all must be joined.⁶⁴ On the other hand, a director may be held liable for wrong-doing after the expiration of his term of service, for example, for wrongfully declaring a dividend.⁶⁵

It has been declared that "there can be no recovery against a minority of the board of directors for misconduct or negligence, inasmuch as they can act only when lawfully assembled, and their duties as such are devolved on them as a board and not individually."⁶⁶ Doubtless this is true in the sense that there can be no recovery against them as a body, for the reason given, but surely a single director may be guilty and none of the others. Again, a director may be guilty who has never attended a board meeting; for example, a director who knew of the wrong-doing of one or more of his co-directors and who purposely avoided the meetings in order to avoid taking part in the proceedings, or of exposing the guilty members.⁶⁷

36. Action by Solvent Bank, or, if Insolvent, Its Representation Against Them.

The primary party to pursue directors for mismanagement is the bank,⁶⁸ and should it fall into insolvency its representa-

64 *Godbold v. Branch Bank*, 11 Ala. 191; *Franklin Ins. Co. v. Jenkins*, 3 Wend. (N. Y.) 130.

65 *Boyd v. Schneider*, 131 Fed. 223, 229; *Boyd v. Mutual Fire Assn.*, 116 Wis. 155, 174; 1 *Morawetz on Priv. Corp.* §563.

66 *Pinney, J., North Hudson B. & L. Assn. v. Childs*, 82 Wis. 460, 475, citing *Franklin Ins. Co. v. Jenkins*, 3 Wend. (N. Y.) 130, 134; *Gaffney v. Colvill*, 6 Hill (N. Y.) 567, 573.

67 *Warner v. Penoyer*, 33 C. C. A. (U. S.) 222.

68 *National Bank v. Wade*, 84 Fed. 10; *Conway v. Halsey*, 44 N. J. Law 462; *Ackerman v. Halsey*, 37 N. J. Eq. 356; *Chester v. Halliard*, 34 N. J. Eq. 341, *affd.* 36 *Ibid.* 313; *Union Nat. Bank v. Hill*, 148 Mo. 380, 393, and cases cited; *Thompson v. Greeley*, 107 Mo. 577; *Smith v. Hurd*, 12 Met. (Mass.) 371; *Peabody v. Flint*, 6 Allen (Mass.) 53; *Abbott v. Merriam*, 8 Cush. (Mass.) 588; *French v. Fuller*, 23 Pick. (Mass.) 108; *Evans v. Brandon*, 53 Tex. 56; *Smith v. Poor*, 40 Me. 415; *Killen v. Barnes*, 106 Wis. 546, 562; *Allen v. Curtis*, 26 Conn. 456; *Hand v. Atlantic Nat. Bank*, 55 How. Pr. (N. Y.) 231; *Hume v. Commercial Bank*, 9 Lea (Tenn.) 728, 744; *Moses v. Ocoee Bank*, 1 Lea 398; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Jones v. Johnson*, 10 Bush (Ky.) 649; *Zinn v. Baxter*, 65 Ohio St. 341, 363, 364; *Horn Silver Mining Co. v. Ryan*, 42 Minn. 196; *Weslosky v. Quarterman*, 51 S. E. (Ga.) 426.

tive—the assignee or receiver.⁶⁹ Not all the directors need be joined, nor can those who are sued question the legality of the corporation.⁷⁰

37. Action by Stockholders of Solvent Bank Against Them.

It often happens that the bank is in complete possession of the directors, who are unwilling to proceed against themselves. Indeed, it can hardly be expected that they will transform themselves from mismanagers into reformers and self-prosecutors. In such cases the stockholders, or a minority of them,⁷¹ who were members at the time the wrongs were committed and still are, at the time of bringing the action,⁷² have a standing in a court of equity to sue in their own names, making the bank a party defendant.⁷³

69 *Thompson v. Greeley*, 107 Mo. 577; *Weslosky v. Quarterman*, 51 S. E. (Ga.) 426; *Union Nat. Bank v. Hill*, 148 Mo. 380, 393; *Coddington v. Canaday*, 157 Ind. 243; *Emerson v. Gaither*, 64 At. (Md.) 26; *Hun v. Cary*, 82 N. Y. 65, 70; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Dykman v. Keeney*, 154 N. Y. 483; *O'Brien v. Fitzgerald*, 150 N. Y. 572; *Empire State Bank v. Beard*, 151 N. Y. 638; *Wallace v. Lincoln Sav. Bank*, 39 Tenn. 630, 637; *Savings Bank v. Caperton*, 87 Ky. 306; *Hayes v. Pierson*, 65 N. J. Eq. 353; *Chester v. Halliard*, 34 N. J. Eq. 341; *Ackerman v. Halsey*, 37 N. J. Eq. 273; *Williams v. Halliard*, 38 N. J. Eq., 373, 376; *Cockrill v. Cooper*, 86 Fed. 7; *Allen v. Luke*, 141 Fed. 694; *Cockrill v. Abeles*, 86 Fed. 505, 528; *Kennedy v. Gibson*, 8 Wall. (U. S.) 498, 506. And a receiver of a national bank need not allege in the bill that violations of the banking act had been previously adjudged in a suit brought by the controller. But the details of the several acts of misconduct by the directors should be fully given. *Allen v. Luke*, 141 Fed. 694.

70 *Coddington v. Canaday*, 157 Ind. 243; *Ramsey v. Peoria Marine Ins. Co.*, 55 Ill. 311; *Stone v. Great Western Oil Co.*, 41 Ill. 85.

71 *Weslosky v. Quarterman*, 51 S. E. (Ga.) 426.

72 *Hanna v. Lyon*, 179 N. Y. 107.

73 *Greaves v. Gouge*, 69 N. Y. 154; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Robinson v. Smith*, 3 Paige (N. Y.) 222; *Bloom v. National Sav. & Loan Co.*, 81 Hun (N. Y.) 120; *Kavanaugh v. Commonwealth Trust Co.*, 103 N. Y. App. Div. 95; *Watts' Appeal*, 78 Pa. 370; *Craig v. Gregg*, 83 Pa. 19; *Morgan v. King*, 27 Colo. 539; *Knoop v. Bohmrick*, 40 N. J. Eq. 82; *Conway v. Halsey*, 44 N. J. Law 462; *Chester v. Halliard*, 34 N. J. Eq. 341; *Jones v. Johnson*, 10 Bush (Ky.) 649; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398; *Hume v. Commercial Bank*, 9 Lea 728, 744; *Zinn v. Baxter*, 65 Ohio St. 341; *Meisse v.*

The same rule may be applied to an assignee or receiver who declines on the request of one or more stockholders to sue the guilty directors.⁷⁴ Nor need any demand be made of him to sue, since he could not be permitted to sue himself, nor would he be a proper person to prosecute a suit against his fellow wrongdoers.⁷⁵ He must, however, be made a party defendant, that he may have an opportunity to defend the action.⁷⁶

38. Nature of Remedy.

The remedy generally is a bill in equity,⁷⁷ by one or more stockholders in behalf of all;⁷⁸ on fewer occasions the courts

Loren, 6 Ohio Dec. 258; *Union Nat. Bank v. Hill*, 148 Mo. 380; *Chetwood v. California Nat. Bank*, 113 Cal. 414; *Horn Silver Mining Co. v. Ryan*, 42 Minn. 196. And if successful in their suit, they may be reimbursed by the bank for all their expense. *Grant v. Lookout Mt. Co.*, 93 Tenn. 691; *Kernaghan v. Williams*, L. R. 6 Eq. (Eng.) 228.

A member of a corporation cannot enforce a cause of action in its favor unless it appears that those whose duty it is to act have, after request, refused to do so, or that they are so concerned in the wrong sought to be redressed and hostile to any attempt to vindicate the corporate rights that it is reasonably certain that a request to proceed would be unavailing. *Northern Trust Co. v. Snyder*, 113 Wis. 516, and cases cited. A stockholder whose stock has been sold out by the bank because of his failure to pay an assessment, caused by the negligence and misconduct of the directors in lending its resources, may maintain an action against the bank and the guilty directors for the loss, which is the value of the stock before the beginning of their misdoing. *Hanna v. People's Nat. Bank*, 35 N. Y. Misc. 517. But a stockholder in a national bank who has parted with his stock cannot maintain an action against the directors before the dissolution of the bank. *Zinn v. Baxter*, 65 Ohio St. 341.

⁷⁴ *Ibid*; *Weslosky v. Quarterman*, 51 S. E. (Ga.) 426. The minority stockholders of an insolvent bank, who petition more than two years after the appointment of a receiver for leave to sue the directors, he being one, for misconduct, are not chargeable with laches in not filing their petition sooner. *Weslosky case*.

⁷⁵ *Weslosky v. Quarterman*, 123 Ga. 312; *Flynn v. Third Nat. Bank*, 122 Mich. 642.

⁷⁶ *Ibid*.

⁷⁷ *North Hudson B. & L. Assn. v. Childs*, 82 Wis. 460; *Sayles v. Central Nat. Bank*, 18 N. Y. Misc. 155; *Flynn v. Third Nat. Bank*, 122 Mich. 642; *Cockrill v. Cooper*, 86 Fed. 7. For more cases see §37.

⁷⁸ In *Bailey v. Mosher*, 11 C. C. A. (U. S.) 304, 307, the court said:

have held that the proper remedy was an action at law.⁷⁹ The assignee or receiver may employ whichever remedy will be most effective.⁸⁰

The petition or complaint must allege a demand of the board to bring the suit unless this would be unavailing;⁸¹ and that each defendant was an officer of the bank when the wrongful acts occurred.⁸² Furthermore, as they are suing in place of the bank, they can enforce only such claims as it could enforce against them.⁸³ Having begun the proceedings, they have a right to conduct them to the end, but must surrender their often hard-won fruits for distribution among all the creditors.⁸⁴ In other words, the cause of action is a corporate as-

"The law will not allow one creditor to appropriate the whole liability of the directors to his own benefit. It is well settled that an injury done to the stock and capital of a corporation by the negligence or misfeasance of its officers and directors is an injury done to the whole body of stockholders in common, and not an injury for which a single stockholder can sue. *Smith v. Hurd*, 12 Met. (Mass.) 371; *Howe v. Barney*, 45 Fed. 668. The same rule applies to the creditors of a corporation."

79 *Higgins v. Teft*, 44 N. Y. App. Div. 62; *Dykman v. Keeney*, 154 N. Y. 483, revg. 21 N. Y. App. Div. 114; *Seventeenth Ward Bank v. Smith*, 51 N. Y. App. Div. 259; *Godbold v. Branch Bank*, 11 Ala. 191; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Commercial Bank v. Chatfield*, 121 Mich. 641. See *Lyon v. Citizens' Loan Assn.*, 30 N. J. Eq. 732 and *Williams v. Halliard*, 38 N. J. Eq. 373.

80 *Hun v. Cary*, 82 N. Y. 65; *Mason v. Henry*, 152 N. Y. 529.

81 *Tevis v. Hammersmith*, 31 Ind. App. 281, citing many cases; *Hanna v. Lyon*, 179 N. Y. 107, 110; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Dykman v. Kenney*, 154 N. Y. 483. Stockholders need not make a demand of directors when they are the persons who have committed the wrongful acts. *Hanna v. Lyon*, 179 N. Y. 107. "Where a corporation so unreasonably neglects and fails to bring an action that such neglect and failure amounts to a refusal to act, the breach of duty which must be shown before an action is commenced by a stockholder will be established as if an express refusal to act had been shown." *Chase, J., Kavanaugh v. Commonwealth Trust Co.*, 103 N. Y. App. Div. 95, 99. In charging the directors with squandering funds the pleader must aver the nature of them. To charge them with loaning funds on inadequate security without specifying the time, persons or circumstances, is insufficient. *Franklin Fire Ins. Co. v. Jenkins*, 3 Wend. (N. Y.) 130.

82 *Gores v. Elliot*, 108 Wis. 465. See *Gores v. Field*, 109 Wis. 408.

83 *Chetwood v. California Nat. Bank*, 113 Cal. 414.

84 *Chetwood case*, 113 Cal. 414; *Zinn v. Baxter*, 65 Ohio St. 341; *Hanna*

set which, on reduction to money, must go into the treasury of the corporation like any other corporate asset.⁸⁵ Should the petitioner refuse, and an agent or receiver be in control of the bank's affairs, he could invoke the aid of the court to acquire possession of them.⁸⁶

39. Action by Creditors.

(a.) Sometimes one or more creditors in behalf of all proceed against the directors. In these controversies, courts have been confronted with a grave legal theory. Ordinarily, creditors in a legal sense are strangers to the officers of a corporation; their business is with the bank; there is no relationship whatever between them and its officers.⁸⁷ A solvent corporation is one thing, an insolvent corporation quite another. So long as a bank is solvent, it is solely responsible to its creditors for all the acts of its officers save those outside their authority, which are not authorized or ratified. But when a bank fails through the mismanagement of its officers, then its creditors can, by proper proceedings, take its property to pay their debts, and the liability of the directors to the bank for mismanagement becomes an asset which the creditors can recover. By the better opinion, therefore, a suit against them is just as proper as one against the bank; both may be sued and often are in the same action.⁸⁸

v. People's Nat. Bank, 76 N. Y. App. Div. 224; Kavanaugh v. Commonwealth Trust Co., 103 N. Y. App. Div. 95, 98. See Craig v. James, 71 N. Y. App. Div. 238.

85 Ibid.

86 Ibid.

87 Deaderick v. Bank, 100 Tenn. 457; Landis v. Sea Isle City Hotel Co., 53 N. J. Eq. 654; 31 At. 755; Poole's case, L. R. 9 Ch. Div. (Eng.) 322, 328; Hart v. Evanson, 105 N. W. (N. Dak.) 942.

88 Gores v. Day, 99 Wis. 276; Gores v. Field, 109 Wis. 408; Killen v. Barnes, 106 Wis. 546; Hurlbut v. Marshall, 62 Wis. 590; South Bend Plow Co. v. Cribb Co., 97 Wis. 230; Marshall v. Farmers' & Mech. Sav. Bank, 85 Va. 676; Warner v. Hopkins, 111 Pa. 328, 332; Delano v. Case, 121 Ill. 247; Soloman v. Bates, 118 N. C. 311; United Society v. Underwood, 9 Bush (Ky.) 609; Winchester v. Howard, 136 Cal. 432; Seale v. Baker, 70 Tex. 283; Bartholomew v. Bentley, 15 Ohio 659; Trustees of Mutual Build-

Recently, in New Jersey, it was contended that a receiver could not sue the directors for mismanagement because he possessed no larger rights than the creditors, who possessed no such authority. But the court was unwilling to confine the rights of creditors within this narrow ground, thereby modifying a former ruling. Both the rights of creditors and of receivers to sue directors for mismanagement are by this decision placed on broader and firmer ground. Says the court: "The receiver is, it is true, the representative of creditors, but he is also the representative of the corporation and of its stockholders. If either the corporation or its stockholders may inquire into the acts charged in this bill, the receiver may."⁸⁹

ing Fund v. Bosseix, 3 Fed. 817; Foster v. Bank, 88 Fed. 604. In Wisconsin in an action by the creditors of an insolvent bank against its officers for mismanagement, the assignee or receiver is officially a necessary party, but not the bank itself, for it has essentially ceased to exist and the assets that are recovered go to the representative. Gores v. Field, 109 Wis. 408; Gores v. Day, 99 Wis. 276. While a depositor can proceed against bank officers directly for receiving deposits knowing their bank is insolvent, without first establishing that fact by a proceeding against the bank, a director cannot be attacked for undertaking a contingent liability for his bank as guarantor or endorser of a note by the holder when his bank was in that condition. Wichita Nat. Bank v. Weeks, 5 Kan. App. 694. Damages resulting to a national bank from the mismanagement of its officers and agents are recoverable only in an action brought by the bank, or for the benefit of all stockholders and creditors. Yates v. Jones Nat. Bank, 105 N. W. (Neb.) 287.

Contra.—Union Nat. Bank v. Hill, 148 Mo. 380, containing an elaborate discussion of the question; Stone v. Rottman, 183 Mo. 552; Fusz v. Spaunhorst, 67 Mo. 256; Frost Mfg. Co. v. Foster, 76 Iowa, 535; Smith v. Poor, 40 Me. 415; Zinn v. Mendel, 9 W. Va. 580; Hart v. Evanson, 105 N. W. (N. Dak.) 942. "A director is the agent of the corporation, and, ordinarily, only liable to the corporation. If he becomes liable directly to a creditor, it must be by statute or by some conduct which creates a privity of contract between them, or which results in a tortious injury to the creditor, for which an action *ex delicto* will lie;" Hume v. Commercial Bank, 9 Lea 728, 747. "Directors may be liable to the stockholders for mismanagement of the business of the corporation, or waste of its assets. Not so as to its creditors. A creditor must show actual fraud in order to hold directors liable." Wilson v. Stevens, 129 Ala. 630, 636.

⁸⁹ Hayes v. Pierson, 65 N. J. Eq. 353, modifying Landis v. Sea Isle City Hotel Co., 31 At. 755, *affd.* 53 N. J. Eq. 654. In California a creditor of a

The courts that still withhold action from creditors, except in cases of deceit, misconceive the position of the courts opposed to them. These do not question the non-relationship between the directors of a bank and its creditors. In permitting them thus to proceed, they take the place of the bank, because, for some reason, it cannot act, or act so effectively. And in such a proceeding the rights, duties and liabilities of directors are in no wise affected by the substitution of creditors for the bank, as the party to whom the directors must answer.

A distinction has been drawn by the Supreme Court of Tennessee worthy of consideration. Though a creditor has no cause of action against directors after the insolvency of their bank for a loss growing out of any contract they may have ordinarily made in conducting the bank's business, they may nevertheless be held for the consequences of their fraud or wilful mismanagement of its affairs.⁹⁰

Finally, in cases wherein redress is denied to one as a creditor, it may be granted to him as a stockholder, if he is one, his legal relationship overcoming the technical objection, previously explained.⁹¹

(b.) While the right of creditors to act in a representative character against directors is not everywhere established, no court withholds relief to one or more creditors against directors or managers for wrongs done directly to themselves, like the fraudulent sale to them of stock belonging to the institution, or the receipt of deposits from them knowing that the bank was insolvent. In a recent case the Supreme Court of Nebraska declared: "That the party upon whom the deceit or imposition was practised by the officers of a national bank may maintain an action against them in his own name and be-

savings bank may sue the directors for misappropriating its funds before he became a creditor. *Winchester v. Howard*, 136 Cal. 432. And the assignee of a depositor can maintain an action against them for misappropriating its funds. *Ibid*.

⁹⁰ *Deaderick v. Bank*, 100 Tenn. 457. See *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630.

⁹¹ *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Halsey v. Ackerman*, 38 N. J. Eq. 501; *Ackerman v. Halsey*, 37 N. J. Eq. 356.

half for damages resulting to him therefrom, and that his right of action does not rest on the federal statutes, but the common law, is no longer an open question.⁹²

40. Duration of Directors' Liability.

The duration of a director's liability is sometimes limited by special law; when it is, of course the general statute does not apply.⁹³

(a.) Is the relation between bank directors and their stockholders of such a confidential character that the rule governing express trustees and their beneficiaries applies, perpetuating the liability so long as the trust continues, resting on the principle that the possession of the trustee is presumed to be the possession of the beneficiary.⁹⁴ Though applied without hesitation by some courts,⁹⁵ it has been withheld more fre-

92 *Lates v. Jones Nat. Bank*, 105 N. W. (Neb.) 287, 288, citing *Stuart v. Bank*, 57 Neb. 576; *Gerner v. Mosher*, 58 Neb. 135; *Gerner v. Lates*, 61 Neb. 100; *Prescott v. Haughey*, 65 Fed. 653; *Gerner v. Thompson*, 74 Fed. 125; *King v. Pomeroy*, 121 Fed. 287; *Briggs v. Spaulding*, 141 U. S. 132. To these may be added, *Hart v. Evanson*, 105 N. W. (N. Dak.) 942; *Baxter v. Coughlin*, 70 Minn. 1; *Cassidy v. Uhlmann*, 170 N. Y. 505; *Zinn v. Mendel*, 9 W. Va. 580. The managers of a trust company who mingle money collected for another with the current funds of the company in violation of the express direction of the owner to remit the same, or permit their subordinates to do this, whereby the fund is lost, are personally liable therefor though it was their intention to remit and account for the money to the owner on demand. *Sweet v. Montpelier Sav. Bank and Trust Co.*, 84 Pac. (Kan.) 542, first trial 69 Kan. 641. Likewise the officers of a bank who assist a gang of conspirators in enticing strangers to bet at a race by using the bank to give an air of respectability to the transaction, thereby assisting in the fraud, are liable to the defrauded strangers. *Hobbs v. Boatright*, 195 Mo. 693.

93 A statute limiting the time for bringing actions against directors or stockholders to recover a forfeiture or to enforce a "liability created by law" means a liability created by statute and not a common law liability. *Gores v. Field*, 109 Wis. 408; *Brinckerhoff v. Bostwick*, 99 N. Y. 185.

94 *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90, 123, 124; *Cooper v. Hill*, 36 C. C. A. 402; *Lindsley v. Dodd*, 53 N. J. Eq. 69; *Jones v. Henderson*, 149 Ind. 458, 461; *Wood on Limitations*, §200.

95 *Williams v. McKay*, 40 N. J. Eq. 189; *Williams v. Rielly*, 41 N. J. Eq. 137; *Somerset Co. Bank v. Veghte*, 42 N. J. Eq. 39. See *Hightower v. Thornton*, 8 Ga. 486; *Ellis v. Ward*, 137 Ill. 509.

quently by others, and the unquestioned tendency of the day is not to regard directors as express trustees, and their liability as not continuing beyond the operation of the ordinary statutes of limitation.⁹⁶

(b.) Which of these rules applies to the trustees or directors of savings institutions? There are some reasons for applying to them the former rule. Most savings banks have a large board of trustees, who are the initiating authority, and the directors, if there be any, are only a smaller body selected from the larger. In other words, the trustees delegate the general management of the institution to a committee or smaller number of their body.⁹⁷ As most savings banks have no stockholders to supervise their conduct, like the stockholders of a bank of discount, the trustees or directors assume larger authority, and are less amenable to any one within for their conduct; for the depositors never meet save on extraordinary occasions, usually after the wrecking of their institution. Thus acting more like technical, than implied trustees, in the sense that the depositors or beneficiaries are helpless, there is a strong reason for applying the same rule of limitation to their misdeeds. If this distinction be correct, the rulings of the courts of New Jersey⁹⁸ rest on a sound basis, while those of Georgia and Illinois are opposed perhaps to those of every other state.⁹⁹

(c.) Assuming then that directors are implied trustees, does the period of limitation begin to run from the time of committing their wrongful acts, or from the time of their discovery? Generally, courts have fixed on the former period, the

96 *Boyd v. Mutual Fire Assn.*, 116 Wis. 155, which see for an elaborate discussion of the subject; *Mason v. Henry*, 152 N. Y. 529; *Pierson v. McCurdy*, 100 N. Y. 608; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Cullen v. Coal Creek Co.*, 42 S. W. (Tenn. Ch. App.) 693; *Landis v. Saxton*, 105 Mo. 486; *Stone v. Rottman*, 183 Mo. 552; *Baxter v. Moses*, 77 Me. 465; *Spering's Appeal*, 71 Pa. 11, 25; *Link v. McLeod*, 194 Pa. 566.

97 See Chap. XXI. §4.

98 See New Jersey cases in note 95. See *Spering's Appeal*, 71 Pa. 11.

99 See other cases in note 95.

time of the fraud, for damages to begin to accrue.¹ But in some cases ² there is authority and strong reason for withholding the operation of the statutory bar until the discovery of their wrong-doings, unless there has been neglect on the part of stockholders, depositors or other creditors who are, or ought to have been, interested in making the discovery. Surely, if a director hides his misdeed, as he often does until the last moment, so that those who ought to know, cannot by reasonable vigilance find out his misdoing, the law ought not to come to his rescue after his villainy has been uncovered with the cold announcement to the unhappy discoverer, "too late, the law will let him go."³

1 *Wilmerding v. Russ*, 33 Conn. 67, 77; *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90; *Landis v. Saxton*, 105 Mo. 486. In *Link v. McLeod*, 194 Pa. 566, an illegal resolution was passed authorizing the payment of money to the president. The statute began to run in favor of the directors, not from the time of paying the money, but from the time of passing the resolution. The highest court in Maryland has ruled that former directors who had retired before the failure of their bank may plead the statute in an action by the receiver to recover for losses springing from their misconduct. *Emerson v. Gaither*, 64 At. (Md.) 26, citing *Spering's Appeal*, 71 Pa. 11; *Williams v. Halliard*, 38 N. J. Eq. 373; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 649.

2 *Larsen v. Utah Loan & Trust Co.*, 23 Utah 449, and cases cited; *Coxe v. Huntsville Gaslight Co.*, 106 Ala. 373. See *Mason v. Henry*, 152 N. Y. 520. In *Cooper v. Hill*, 36 C. C. A. 402, the court said: "If unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute. *Kelley v. Boettcher*, 29 C. C. A. 14, 21. If the acts of the appellants had been part of a continuous and persistent course of action which had wrecked this bank and robbed its creditors and stockholders, if they had been accompanied with intentional misrepresentation, if they had been purposely or negligently concealed from the other officers and employes of the bank, or from its stockholders and creditors, these facts might well induce a court of equity to permit this suit to be maintained, notwithstanding the statute." See also *Jackson v. Jackson*, 149 Ind. 238, and Chaps. XIII. §22 and XV. §16.

3 See Chap. IX, §42. "It is the settled doctrine of this State," says Ladd, J., speaking for the Supreme Court of Iowa, "that where a party against whom a course of action has accrued in favor of another by fraudulent concealment prevents such other from obtaining knowledge thereof, the statute of limitations will begin to run from the time the right of ac-

41. Survival of Action.

One other question remains, how far does the liability of a director survive his death, rendering his estate liable therefor? While the principle is everywhere held that every liability of a penal nature is buried with the wrong-doer,⁴ courts are still divided in defining the various forms of directorial liability that survive. The clear tendency is to give this liability a remedial rather than a penal stamp. While an action of deceit, for example, cannot be maintained by a creditor against the estate of a deceased director for receiving a deposit knowing that his bank was at the time insolvent;⁵ the bank, or its representatives, can maintain an action either by common law or statute against his estate for mismanagement, in other words for diverting and wasting the bank's property, through making improper loans, dividends and the like.⁶ The essence of the action is to recover misapplied money. Therefore the estate of an officer, who takes a draft from a creditor of the bank agreeing to deposit it to his credit, but who, instead of doing so, pays the draft from the funds of the bank and retains the money—is liable therefor.⁷ To a contention in Massachusetts that the liability of a director for mismanagement did not survive the court replied: "We do not perceive why it should not. It arose from a breach of a fiduciary relation by which he enriched himself."⁸ Whether the liability to pay a

tion is discovered, or, by the exercise of ordinary diligence, might have been discovered." *Mereness v. First Nat. Bank*, 112 Iowa 11, 14.

4 *Killen v. Barnes*, 106 Wis. 546. See 1 *Woerner on Am. Law of Administration*, §§290-293.

5 *Killen v. Barnes*, 106 Wis. 546; *First Nat. Bank v. Briggs*, 70 Vt. 599.

6 *Pierson v. Morgan*, 17 N. Y. Civ. Proc. 124; *O'Brien v. Blaut*, 17 N. Y. App. Div. 288; *Warren v. Robison*, 21 Utah 429; *Boyd v. Schneider*, 65 C. C. A. 209; *Allen v. Luke*, 141 Fed. 694; *Stevens v. Overstolz*, 43 Fed. 465, 771. See *Killen v. Barnes*, 106 Wis. 546.

Contra.—*Boston & Maine R. v. Graves*, 80 Fed. 588; *Witters v. Foster*, 26 Fed. 737; *First Nat. Bank v. Briggs*, 70 Vt. 599.

7 *First Nat. Bank v. Briggs*, 70 Vt. 599.

8 *Winnebaugh v. U. S. Railway Adv. Co.*, 173 Mass. 60, 61, citing *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97, 104.

prescribed sum for neglecting to make reports required by law is in the nature of a penalty and consequently not surviving is a closer question. By the highest federal tribunal they are not thus regarded;⁹ but otherwise by several state jurisdictions.¹⁰

42. Effect of Releasing One Director.

As the liability of directors is joint, a settlement with, and release of one of them releases all.¹¹ This is an ancient rule resting on the theory that, as the wrong is an entire indivisible act, a satisfaction from one and a release to him must enure to the benefit of all.¹² Yet all need not be joined in the same action;¹³ and if only one is sued who is compelled to pay, though the others are equally guilty, he may have redress against them.¹⁴ Since this is the law everywhere, why ought not the law to permit a settlement to be made with one or more without discharging all? The ancient theory, that blocks the path, logical as it may be, is giving way to the intention of the parties as a juster and more rational guide. When the proof is clear that the money or other thing paid or done by one or more of the doers, but not all, was only as a partial satisfaction and intended to discharge only those from whom it proceeded, it will not affect the liability of the others.¹⁵ Lastly, as a partner or other member of a joint party liable on a contract may be released by statute¹⁶ and common law,¹⁷ without

9 *Huntington v. Attrill*, 146 U. S. 657, containing an elaborate discussion of the question.

10 *Brackett v. Griswold*, 103 N. Y. 425; *Stokes v. Stickney*, 96 N. Y. 323. See Chap. II. §10.

11 *Chetwood v. California Nat. Bank*, 113 Cal. 414, and 649; *Robinson v. Bealle*, 20 Ga. 275. See extensive notes 58 L. R. A. 293, and 11 Am. St. Rep. 906.

12 *Miller v. Beck*, 108 Iowa 575, 578, and cases cited; *Donaldson v. Carmichael*, 102 Ga. 40, 42.

13 *Chetwood v. California Nat. Bank*, 113 Cal. 414, 425; *Hun v. Cary*, 82 N. Y. 65, 70; *Grundel v. Union Iron Works*, 127 Cal. 438; *Smith v. Gayle*, 58 Ala. 600, 606.

14 See *Jaggard on Torts*, §69, p. 215.

15 *Ibid.*

16 *Miller v. Beck*, 108 Iowa 575, 578; *Bonney v. Bonney*, 29 Iowa 448;

releasing the others, it is not clearly seen why the law should so jealously guard a theory not in harmony with modern conceptions of justice. Surely a joint tortfeasor is not more worthy of judicial regard than a joint contractor.

43. Rule of Duty and Liability Applying to Managing Partner.

This chapter may be closed by stating the rule of duty and liability that applies to a managing partner.¹⁸ A recent exposition of the law has been given by the Supreme Court of Iowa. He "must act in good faith and in entire honesty in transacting all the business of the bank, and exercise as high a degree of care and skill as is generally exercised by business men in the management of such business."¹⁹ But he is not liable for honest errors in judgment, nor for failure to take the utmost precaution possible in making the investments for the bank."²⁰

Matthews v. Chicopee Mfg. Co., 3 Robt. (N. Y. Super.) 711; *Irvine v. Milbank*, 15 Abb. Pr. (N. Y. N. S.) 378; *Sloan v. Herrick*, 49 Vt. 327; *Smith v. Gayle*, 58 Ala. 600, construing Rev. Code, §3039; *Bloss v. Plymale*, 3 W. Va. 393; *Derosa v. Hamilton*, 14 Pa. Co. Ct. 307; 2 Purdon's Pa. Dig. §10, 14, p. 1121; Ala. Rev. Code, §3039.

17 *Matthews v. Chicopee Mfg. Co.*, 3 Robt. (N. Y. Super.) 711; *Price v. Barker*, 1 Jurist (Eng. N. S.) 775.

18 See Chap. V. §37, for the liability of private partners.

19 *Bank v. Johnson*, 94 Iowa 220.

20 *Exchange Bank v. Gardner*, 104 Iowa 176, 182. In this case the cashier purchased worthless paper, which a careful inquiry would have disclosed. See *Charlton v. Sloan*, 76 Iowa 288; *Knapp v. Edwards*, 57 Wis. 196.

CHAPTER 1X.

MANAGING OFFICERS.

1. Mode of election.
 2. Authority of de facto officer.
 3. Bonds.
 - a. Requirements.
 - b. Effect of representation to surety about principal.
 - c. Rules of construction.
 - d. Recital controls condition.
 - e. When bond begins to run.
 - f. Effect of promotion.
 - g. Effect of temporary and permanent expansion of duty.
 - h. Effect of increasing bank's capital and compensation of officers.
 - i. Duration of bond.
 - j. Cessation of continuing contract.
 - k. Revocation.
 1. Defective statutory bond may be good at common law.
 - m. Director may serve as surety.
 - n. Use of official reports by surety as a defence.
 - o. Notice to surety of principal's default.
 - p. Proof required of principal's default.
 - q. Operation of statute of limitations.
 - r. Defences. Amount of recovery.
 - s. Preservation of identity of banking firm or corporation.
4. Compensation, how fixed.
 - a. General rule.
 - b. Application to directors.
 - c. To managing officers.
 - d. Discussion of the rule.
 - e. Compensating vice-president.
 - f. Reduction for absence.
 - g. Reduction of salary during term of office.
 - h. What action is needful to perfect a salary-contract.
 - i. President's right to undertake outside service.
 - j. Officers cannot draw salary after bank's failure.
 5. Similarity of authority of managing officers.
 6. Requirements.
 7. Authority determined by practice and usage.
 8. When is entire authority conferred on them.
 9. Boundary of authority between directors and managing officers.
 10. They cannot exceed bank's authority.
 11. Modes of exceeding official, but not bank's authority.
 12. Sub-division of authority between officers.
 - a. Vice-president.
 - b. Officers with same titles have varying powers.
 13. Officers must act within the bank.

14. Contracts between officers and their banks.
15. Legality of contract containing legal and illegal parts.
16. Authority of savings bank president.
17. Exercising authority after re-signing.
18. Declarations or information.
 - a. Inquiries concerning investments and customers.
 - b. Answers known to inquirer to transcend officers' authority.
 - c. Officers' knowledge concerning matters in which he has a personal interest.
19. Specific exercise of authority. Selection and oversight of subordinates.
20. Loans.
21. Collection of debts.
22. Transfer of paper.
23. Borrowing.
24. Receiving deposits.
25. Reviving debts and confessing judgments.
26. Certification.
27. Real estate transactions.
28. Compromises and litigation.
29. Miscellaneous exercise of power.
30. Limitations on officers' powers.
31. Liability of bank for contracts of officers within scope of their authority.
32. Liability of officer for his own acts.
33. What acts can be ratified.
 - a. All the bank could do.
 - b. Bank is not required to ratify unless accepting the results.
 - c. When bank does ratify by accepting results.
 - d. Ratification of acts not within scope of bank.
 - e. When officer is not relieved by ratification.
 - f. Excessive acts not beneficial, cannot be ratified.
34. Essential conditions of ratification.
35. Mode of ratifying.
36. Officer cannot ratify his own act.
37. Effect of ratifying.
38. Liability of officer to his bank for frauds.
39. Receiving misapplied property.
40. Liability of officer to bank for negligence.
41. When stockholders can restrain him for mismanagement.
42. Statute of limitations. Survival of liability.
43. Liability of officer to individuals.
44. Liability of bank for officers' torts.
 - a. Specific act for which bank is liable.
 - b. It is not liable for acts outside its authority.
 - c. Liability of bank for a continuous wrongful infraction, though for a right act.
 - d. Wrongful reports and other statements.
 - e. No officer can authorize another to commit a wrong.

1. Mode of Election.

The president and other officers are chosen annually, though they may be chosen for a longer term of service,¹ unless positively forbidden, as are national bank officers,² by statute. This inhibition of the national law rests on the idea that they may thereby be kept more perfectly within the bank's control. The election of an officer by a majority of the quorum of the board of directors is valid, and his title is complete as soon as the vote is declared.³ The suspension of an officer takes effect from the time of his notification.⁴

2. Authority of De Facto Officer.

Like a director, a president who holds his office under color of right, is, in truth, president de facto, and his acts are valid which concern the bank and a third party.⁵

3. Bonds.

(a.) All bank officers, excluding directors,⁶ are required to give bonds. Latitude is allowed in framing the instrument,—broad enough to cover an omission to express the consideration.⁷ Delivery is needful, and, though long delayed, is not

1 Sparks v. Farmers' Bank, 3 Del. Ch. 274, 292; Union Bank v. Ridgely, 1 Har. & Gill (Md.) 324; Dedham Bank v. Chickering, 3 Pick. (Mass.) 335; Holland v. Lewiston Falls Bank, 52 Me. 564.

2 Harrington v. First Nat. Bank, 1 Th. & C. (N. Y.) 361; Westervelt v. Mohrenstecher, 40 U. S. App. 221.

Contra.—First Nat. Bank v. Briggs, 69 Vt. 12, containing a review of many cases.

3 Booker v. Young, 12 Gratt. (Va.) 303.

4 M'Gill v. Bank, 12 Wheat. (U. S.) 511.

5 Baird v. Bank, 11 Serg. & R. (Pa.) 411; Bank v. Dandridge, 12 Wheat. (U. S.) 64, 70; Union Mining Co. v. Rocky Mt. Nat. Bank, 2 Colo. 248; Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548, 559; Mahony v. East Holyford Mining Co., L. R. 7 H. of L. Cases (Eng.) 869.

6 Sometimes a director gives one. State Treasurer v. Mann, 34 Vt. 371.

7 Bank of Carlisle v. Hopkins, 1 T. B. Mon. (Ky.) 245; Pendleton v. Bank of Ky., 1 T. B. Mon. 171; Grocers' Bank v. Kingman, 16 Gray (Mass.) 473; Bank v. Cresson, 12 Serg. & R. (Pa.) 306; State Bank v. Locke, 4 Dev. Law (N. C.) 529; Graves v. Lebanon Nat. Bank, 10 Bush (Ky.) 23; Fourth Nat. Bank v. Spinney, 47 Hun (N. Y.) 293; La Rose v. Logansport Nat. Bank, 102 Ind. 332, 341.

less effective.⁸ Acceptance may, or may not be essential. It is required by the bank whenever the guaranteeing party in signing the bond is making a mere offer of guaranty; but when such action is the result of a previous understanding, of which the consideration is conclusive evidence, no notice of acceptance is required.⁹ In many of the cases the distinction has not been observed, and acceptance, though often informal, has been deemed essential.¹⁰ *

Not infrequently several sureties agree to sign, but one or more of them may neglect or refuse to append their signatures, and the bond in this imperfect condition is delivered to the bank. Are the signers bound? They surely are not if the bank had notice, actual or constructive, of the conditional agreement. But if the bond on its face is complete, and the bank had no knowledge of the conditional agreement, the signers are bound.¹¹ The omission of the principal to sign is a technical defect and will not release the sureties, unless they

8 *Wylie v. Commercial & Farmers' Bank*, 63 S. C. 406.

9 *Buhrer v. Baldwin*, 137 Mich. 263; *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524, 527; *Davis v. Wells*, 104 U. S. 159, 167; *Lawrence v. McCalmont*, 2 How. (U. S.) 426; *Taylor v. John A. Tolman Co.*, 47 Ill. App. 264. See Chap. VII. §4a.

10 *Franklin Bank v. Cooper*, 36 Me. 179; *Dedham Bank v. Chickering*, 3 Pick. (Mass.) 335; *Amherst Bank v. Root*, 2 Met. (Mass.) 522; *Johnson v. Gerald*, 169 Mass. 500; *Union Bank v. Ridgeley*, 1 Har. & Gill (Md.) 324; *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23; *Bostwick v. Van Voorhis*, 91 N. Y. 353; *Wylie v. Commercial & Farmers' Bank*, 63 S. C. 406; *Fiala v. Ainsworth*, 63 Neb. 1.

11 *Middleboro Nat. Bank v. Richards*, 55 Neb. 682; *State Bank v. Evans*, 15 N. J. Law 155; *Benton Co. Sav. Bank v. Boddicker*, 117 Iowa 407. See note, 90 Am. St. Rep. 194 and discussion of authorities in *Gay v. Murphy*, 134 Mo. 98. If a bond, perfect on its face, is delivered in escrow to a third person, who delivers it to the obligee, with or without notice of the condition, the delivery is invalid and the obligee is not bound. The question of the good or bad faith of the obligee is immaterial. But if the bond is imperfect on its face, parol evidence is admissible to show the conditions, no matter by whom the bond was delivered, the instrument itself affects the obligee with notice of its incompleteness. *Blair v. Security Bank*, 50 S. E. (Va.) 262, 264. See valuable note on what matters existing at or prior to entering into a contract of surety or guaranty will discharge the surety or guarantor, 63 Am. St. Rep. 327.

have signed on the condition known to the obligee, that the bond is not to become effective until the principal has signed.¹²

(b.) At the time of giving a bond a representation, either orally or in writing, made by an officer to the surety concerning the proposed obligor's responsibility is not binding on the bank. The statement, whatever it may be, is personal, outside his official scope.¹³ Indeed, the representation of a president, cashier or other officer concerning the honesty, fidelity, and conduct of another official is not binding on any one, unless it is a warranty,¹⁴ or is intended to deceive,¹⁵ and is effective. If the representation is ambiguous, it will not be regarded as a warranty unless the language cannot be otherwise construed.¹⁶ The representer's intention to deceive is a fact for ascertainment in the ordinary manner.¹⁷ That the insured was actually a defaulter at the time of representing his moral worth, does

12 *Clark v. Bank of Hennessey*, 79 Pac. (Okla.) 217 and cases cited; *Bank v. Cresson*, 12 Serg. & R. (Pa.) 306.

Contra.—*Wild Cat Branch v. Ball*, 45 Ind. 213.

13 *U. S. Fidelity & Guaranty Co. v. Muir*, 53 C. C. A. 56; *American Surety Co. v. Pauly*, 170 U. S. 133; *Fidelity & Deposit Co. v. Courtney*, 43 C. C. A. 331; *American Bonding Co. v. Spokane Building Assn.*, 65 C. C. A. 121; *Lieberman v. First Nat. Bank*, 2 Penn. (Del.) 416; *Ida Co. Sav. Bank v. Seidensticker*, 128 Iowa 54. A fidelity bond providing that any "wilful misstatement," or suppression of fact by the employee shall render void the bond from the beginning, means any material false statement made with knowledge of its falsity voluntarily and not inadvertently. *Fidelity & Casualty Co. v. Bank of Timmons-ville*, 139 Fed. 101 (C. C. A.). Nor will a mere belief on the part of the employer's president, that it is immaterial whether questions asked are answered truly or not, render such answers immaterial. *Ibid.* In an action by a receiver against a surety company to recover on the bond of a defaulting president, it must be construed as a whole. The receiver cannot repudiate the authority of the assistant cashier to bind the bank by some statements concerning the president and be allowed to recover on the strength of other statements and representations made by him. *Wilmington v. Fidelity & Deposit Co.*, 85 Pac. (Okla.) 713.

14 *American Bonding Co. v. Spokane Building Assn.*, 65 C. C. A. 121.

15 *First Nat. Bank v. Fidelity & Guaranty Co.*, 110 Tenn. 10.

16 *Guthrie Nat. Bank v. Fidelity & Deposit Co.*, 14 Okla. 636, and cases cited; *American Bonding Co. v. Spokane Building Assn.*, 65 C. C. A. 121; *American Surety Co. v. Pauly*, 170 U. S. 133, 144.

17 *First Nat. Bank v. Fidelity & Guaranty Co.*, 110 Tenn. 10.

not bind the representer unless he sought to deceive the surety.¹⁸ But the representation of a president of a bank, that he knows nothing unfavorable about an employee's habits, knowing in truth that he is speculating is a misrepresentation.¹⁹

(c.) In construing a bond the intention of the parties must be regarded;²⁰ a strict and favorable construction for the surety must be put thereon;²¹ his liability cannot, without his consent, be extended or enlarged either by the bank or by operation of law;²² and any unauthorized variation in the bond that may prejudice him relieves him from its operation.²³ Like other written instruments the surety's liability cannot be modified by parol evidence.²⁴

A condition in a bond that the officer "will honestly, faithfully and efficiently discharge the duties of his position," is a guaranty of his competency, skill, and diligence.²⁵

(d.) In defining the liability assumed by a surety the recital, prescribing the narrower field of duty, is the guide rather than the condition.²⁶

18 *Tapley v. Martin*, 116 Mass. 275; *Franklin Bank v. Stevens*, 39 Me. 532; *Farmington v. Stanley*, 60 Me. 472; *First Nat. Bank v. Fidelity & Guaranty Co.*, 110 Tenn. 10, 22; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *United States v. Kirkpatrick*, 9 Wheat. (U. S.) 720.

19 *Guarantee Co. v. Mechanics' Sav. Bank*, 183 U. S. 402.

20 *Westervelt v. Mohrenstecher*, 22 C. C. A. 93; *Bank v. Fidelity & Deposit Co.*, 128 N. C. 366.

21 *Ibid*; *Ward v. Stahl*, 81 N. Y. 406; *Miller v. Stewart*, 9 Wheat. (U. S.) 680.

Contra.—*Bank v. Fidelity & Deposit Co.*, 128 N. C. 366, 372.

22 *Bensinger v. Wren*, 100 Pa. 500; *Grocers' Bank v. Kingman*, 16 Gray (Mass.) 473, 475.

23 *Ibid*; *Smith v. United States*, 2 Wall. (U. S.) 219; *Bonar v. Macdonald*, 3 H. of L. Cases (Eng.) 226.

24 *Wylie v. Commercial & Farmers' Bank*, 63 S. C. 406. It may be shown that an indemnity bond given by a bank's cashier in a private transaction, to which, however, has been added the word "cashier," is not in any way the obligation of the bank. *Gardner v. Cooper*, 9 Kan. App. 587.

25 *Fiala v. Ainsworth*, 63 Neb. 1; *American Bank v. Adams*, 12 Pick. (Mass.) 303; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46.

26 *National Mech. Bkg. Assn. v. Conkling*, 90 N. Y. 116, affg. 24 Hun 496; *Amherst Bank v. Root*, 2 Met. (Mass.) 522, 536; *Dedham Bank v. Chickering*, 3 Pick. (Mass.) 335; *Tradesmen's Bank v. Woodward*, An-

(e.) A bond begins to run, unless the language states otherwise, for the wrong-doings of the principal after the execution and delivery of the instrument.²⁷ Very generally the words are intended to have a retrospective operation; nor can the right of giving this effect to them be questioned.²⁸ Thus a bond contained this clause in the condition: "And shall account for all notes . . . entrusted to his . . . possession as cashier of said bank since he has held the office of cashier." In construing these words the court remarked that "no person about to become surety upon reading the condition could fail to understand that he would become liable for an account by the cashier of all property entrusted to him since he had been cashier as well as for his future faithfulness."²⁹

(f.) By promotion, an officer assumes greater responsibility, and his bond, unless it has been renewed, or provides for promotion, does not cover defalcations in his higher office.³⁰

thon's N. P. (N. Y., 2d Ed.) 300; *Blades v. Dewey*, 136 N. C. 176; *Lord Arlington v. Mericke*, 3 Saund. (Eng.) 403; *Hassell v. Long*, 2 M. & S. (Eng.) 363; *London Ass. Co. v. Bold*, 6 Ad. & E. (Eng. N. S.) 514.

27 *United States v. Brown*, 1 Gilpin (U. S.) 155; *La Rose v. Logansport Nat. Bank*, 102 Ind. 332. A bond bearing no other date than "the — day of — 1869," is legally presumed not to have become binding until the last day of the year. *Graves v. Lebanon Nat. Bank*, 10 Bush. (Ky.) 23. By statute and by-laws a board of directors was required at their first meeting to elect a president and appoint a cashier, who should hold their offices at the pleasure of the board, and should give bonds approved by that body. A cashier was appointed, who gave a bond stating no time for it to be operative, though the cashier was reappointed at subsequent annual meetings. It was held that he did not hold office for fixed annual terms, and hence the bond was not limited to his first year's employment, but was a continuing one. *Ida Co. Sav. Bank v. Seidensticker*, 128 Iowa 54.

28 *McMullen v. Winfield Building Assn.*, 64 Kan. 298; *Franklin Bank v. Cooper*, 36 Me. 189, 192, 193.

29 *Franklin Bank v. Cooper*, 36 Me. 179. A bank cashier's bond, given March 7, 1901, covered acts and defaults committed during its currency and within twelve months next before the date of the discovery of the act or default on which the claim was based. The bond did not cover a larceny of silver coin deposited May 19, 1900, but not in the bank's vaults when the cashier absconded in Aug., 1901. *Fidelity & Casualty Co. v. Bank of Timmonsville*, 139 Fed. 101.

30 *Northwestern Nat. Bank v. Keen*, 14 Phila. 7; *National Mech. Bkg.*

But it does include a defalcation while occupying the lower office, though not discovered until after his promotion.³¹

(g.) Again, a bond is operative while the officer is temporarily occupying a higher office or performing additional duties.³² Does the bond cover new duties permanently attached to the original office? On this question the authorities divide. If the new duties bring new responsibilities, appreciably increase the risk, and the surety neither knows nor consents to the change, does not justice require his release? It is true that occasional changes in administering almost any office are needful, and are understood by the surety when incurring his obligation;³³ but he hardly expects important changes to be made without his knowledge and acquiescence.³⁴

Suppose the duties of an officer are expanded, and the officer goes astray in performing his original duty, is his surety released? On one occasion a person who was bonded as a bookkeeper and afterward performed the additional duties of a teller, made false entries in his books. His sureties were held, but the court remarked that they could not have been held for any defalcation as a teller. The court also added: "It may be they should not be held liable for any false entries made by

Assn. v. Conkling, 90 N. Y. 116; *Champion Ice Co. v. Bonding & Trust Co.*, 25 Ky. L. Rep. 239, 243.

31 *Ibid.*

32 *Detroit Sav. Bank v. Ziegler*, 49 Mich. 157; *Rochester City Bank v. Elwood*, 21 N. Y. 88; *National Mech. Bkg. Assn. v. Conkling*, 90 N. Y. 116; *Fourth Nat. Bank v. Spinney*, 47 Hun (N. Y.) 293; *Mayor v. Kelly*, 98 N. Y. 467; *German Am. Bank v. Auth*, 87 Pa. 419; *Home Sav. Bank v. Traube*, 75 Mo. 199; *Garnett v. Farmers' Nat. Bank*, 91 Ky. 614, 618; *Lieberman v. First Nat. Bank*, 40 At. (Del.) 382, *affd.* 2 Penn. (Del.) 416; *Champion Ice Co. v. Bonding & Trust Co.*, 25 Ky. L. Rep. 239, 243; *State Treasurer v. Mann*, 34 Vt. 371; *Planters' Bank v. Lamkin*, R. M. Charlton (Ga.) 29; *Fidelity & Casualty Co. v. Gate City Nat. Bank*, 97 Ga. 634.

33 Affirmative view: *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46, 73; *Wallace v. Exchange Bank*, 126 Ind. 265; *Rollstone Nat. Bank v. Carleton*, 136 Mass. 226; *Home Sav. Bank v. Traube*, 75 Mo. 199.

Negative view: *Bonar v. Macdonald*, 3 H. of L. Cases (Eng.) 226; *Evans v. Whyte*, 5 Bing. (Eng.) 485; *Archer v. Hale*, 4 Bing. (Eng.) 464; *Eyre v. Bartrop*, 3 Madd. (Eng.) 221; *Whitcher v. Hall*, 5 Barn. & Cress. (Eng.) 269; *North Western R. v. Whinray*, 10 Ex. (Eng.) 77.

34 *Rollstone Nat. Bank v. Carleton*, 136 Mass. 226.

him in order to conceal such defalcation, as it might be regarded as having been indirectly occasioned by the action of the bank in appointing him teller." This distinction, though narrow, is clear, just, and worth regarding.³⁵

(h.) The courts are also divided on two other questions—the effect of increasing a bank's capital³⁶ and also of increasing or reducing the compensation of a bank officer.³⁷ Both questions have been answered on somewhat narrow grounds. Ought not the answer to turn on the inquiry whether the officer's responsibility is thereby increased? An increase to a bank's capital might not increase in the slightest degree the responsibility of a bookkeeper, but might very appreciably the responsibility of a paying teller. In like manner an officer might have his salary raised, to his great delight, without increasing in the least his duties and responsibilities. We think the true answer must come from the inquiry have these changes appreciably added to the responsibilities of an officer to a degree not intended by the surety when incurring his obligation. The sureties of officers who are thus affected by the changes are doubtless released.

(i.) The duration of a bond³⁸ is not always clearly fixed. If the bond specifically states the period, or is continued by agreement, there is no question.³⁹ One limit is decisive, the chartered period of a bank, unless an extension or renewal is specifically covered.⁴⁰

35 *Home Sav. Bank v. Traube*, 75 Mo. 199.

36 In *Grocers' Bank v. Kingman*, 16 Gray (Mass.) 473, by an increase of capital the surety was relieved. See also *Bensinger v. Wren*, 100 Pa. 500, 505.

Contra.—*Bank v. Wollaston*, 3 Har. (Del.) 90.

37 *North Western R. v. Whinray*, 10 Ex. (Eng.) 77. See *Bonar v. Macdonald*, 3 H. of L. Cases (Eng.) 226.

38 See *Ida Co. Sav. Bank v. Seidensticker*, 128 Iowa 54.

39 *Welch v. Seymour*, 28 Conn. 387; *Ulster Co. Sav. Institution v. Young*, 15 N. Y. App. Div. 181; *Ida Co. Sav. Bank v. Seidensticker*, 128 Iowa 54; *Westervelt v. Mohrenstecher*, 22 C. C. A. 93, and cases cited.

40 *Thompson v. Young*, 2 Ohio St. 334; *Union Bank v. Ridgely*, 1 Har. & Gill (Md.) 324, 433; *Bank v. Barrington*, 2 P. & W. (Pa.) 27.

Contra.—*Exeter Bank v. Rogers*, 7 N. H. 21. See *Amherst Bank v. Root*, 2 Met. (Mass.) 522, 535-538.

The principal difficulties have arisen in cases of officers elected annually who gave a bond, as the law required, at the beginning of their period of service, were re-elected for several years, neglected to renew their bond, and after their re-election committed a defalcation. Various attempts have been made to hold sureties on the ground that the bond was continuing, and the tendency of the courts is to give this construction if the language, or that of the statutes pertaining thereto, will admit.⁴¹ If the condition of the bond be during the principal's "continuance in office . . . even though he hold under successive appointments;"⁴² "or while and so long as he acts as treasurer of the bank;"⁴³ or "for and during all the time he shall hold office;"⁴⁴ or the term of the bond is fixed by a statute or by-law⁴⁵ prescribing that "the principal is to hold office until another is appointed"⁴⁶—the liability clearly is continuous.

More generally, the principal is appointed or elected for one year and until his successor is appointed; or the law provides that, though appointed annually, he shall hold office until the election or appointment of his successor. Whether a bond containing these conditions is continuous, has hopelessly divided the courts. The larger number, keeping in mind the general rule of construction, a strict and favorable construction for the surety, have resolved the doubt in his favor.⁴⁷ Of

41 *La. State Bank v. Ledoux*, 3 La. Ann. 674.

42 *Ulster Co. Sav. Institution v. Young*, 15 N. Y. App. 181.

43 *Commonwealth v. Reading Sav. Bank*, 129 Mass. 73; *Dedham Bank v. Chickering*, 3 Pick. (Mass.) 335.

44 *Westervelt v. Mohrenstecher*, 22 C. C. A. 93.

45 *Danvers Farmers' Elevator Co. v. Johnson*, 93 Minn. 323; *McMullen v. Winfield Building Assn.*, 64 Kan. 298.

46 *Amherst Bank v. Root*, 2 Met. (Mass.) 522, 535-538. See *Welch v. Seymour*, 28 Conn. 394 for an understanding of this case.

47 Cases in which the surety has been released. *Harris v. Babbit*, 4 Dill. (U. S.) 185; *McIlroy Bkg. Co. v. Dickson*, 66 Ark. 327; *Welch v. Seymour*, 28 Conn. 387; *Kingston Mutual Ins. Co. v. Clark*, 33 Barb. (N. Y.) 196; *Bigelow v. Bridge*, 8 Mass. 275; *Chelmsford Co. v. Demarest*, 7

late years bonds have been differently framed and cover promotions, changes in service, and many other contingencies.⁴⁸

(j.) Of course a continuing contract does not run forever. It may be dissolved by the surety at his own pleasure on reasonable notice.⁴⁹

(k.) Bonds are often renewed, and questions arise concerning the effect of renewals. On one occasion a guaranty company gave a bank a \$7,000 bond to indemnify it from loss through the fraud or dishonesty of a bookkeeper during the continuance of the bond, or any renewal. The liability was limited to a year. A renewal certificate on the same conditions for another year was executed. The bookkeeper proved to be a defaulter the first year for more than \$7,000 and the second year for over \$13,000. An action was brought to recover full penalties on both bonds. But the court held that the renewal certificate only extended the indemnity certificate for another year, and that there was in fact only one bond with a penalty of \$7,000 to which the recovery was limited.⁵⁰

(l.) Though a bond may not fulfil the statutory standard, it may nevertheless be effective as a common law bond, unless the conditions are opposed to a statute or to morality.⁵¹

Gray (Mass.) 1; *First Nat. Bank v. Briggs*, 69 Vt. 12 (1894), reviewing many cases; *Dover v. Twombly*, 42 N. H. 591; *Blades v. Dewey*, 136 N. C. 176. In *Ulster Co. Sav. Institution v. Ostrander*, 15 N. Y. App. 181, 184, the court said: "Ordinarily the sureties upon an official bond are not liable for any breach of the condition happening after the expiration of the term for which the officer is elected or appointed, although such officer may be continued in office under the same or a new appointment or election," citing *Overacre v. Garrett*, 5 Lans. (N. Y.) 156. See *Frankfort Bank v. Johnson*, 23 Me. 322; *State Treasurer v. Mann*, 34 Vt. 371.

Contra.—*Sparks v. Farmers' Bank*, 3 Del. Ch. 274; *Merchants' Bank v. Honey*, 58 Kan. 603; *Elam v. Commercial Bank*, 86 Va. 92; *Deposit Bank v. Hearne*, 20 Ky. L. Rep. 1019; *State v. Berg*, 50 Ind. 496; *Thompson v. State*, 37 Miss. 578; *Placer Co. v. Dickerson*, 45 Cal. 12; *State v. Daniel*, 6 Jones Law (N. C.) 444; *Ida Co. Sav. Bank v. Seidensticker*, 128 Iowa 54.

48 *Shackamaxon Bank v. Yard*, 143 Pa. 129.

49 *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 345.

50 *First Nat. Bank v. Fidelity & Guaranty Co.*, 110 Tenn. 10.

51 *Bank v. Smith*, 5 Allen (Mass.) 413; *Grocers' Bank v. Kingman*, 16

(m.) A director may be a surety,⁵² but as he afterwards passes on the sufficiency of the bond, the propriety of his act has been questioned. Were all sureties directors, the impropriety of accepting their own bond no one could deny. But after assuming this liability, they cannot escape by the easy method of reporting a delinquent's transactions to be correct, followed by a resolution of the board discharging them.⁵³ Such conduct is a loud warning that directors ought to be forbidden, as they are in Maine and some other states, from undertaking these obligations.⁵⁴

(n.) How far may examinations, statements, and formal reports of directors be used as a defence by sureties who claim that they have been misled by them into thus acting as security for a bank officer? The general principle is, so long as directors, in making their examinations, act in good faith, though they may be gravely negligent in performing the service, and act in like good faith in publishing reports and making statements, sureties remain bound.⁵⁵ By-laws that provide for periodical examinations form no part of the contract

Gray (Mass.) 473; *Bank v. Cresson*, 12 Serg. & R. (Pa.) 306; *Franklin Bank v. Cooper*, 36 Me. 179; *Buhrer v. Baldwin*, 137 Mich. 263; *State Bank v. Locke*, 4 Dev. (N. C.) 529; *Bank of Carlisle v. Hopkins*, 1 T. B. Mon. (Ky.) 245. For more cases see *Sweetser v. Hay*, 2 Gray (Mass.) 49.

⁵² *Amherst Bank v. Root*, 2 Met. (Mass.) 522; see *Franklin Bank v. Cooper*, 36 Me. 179.

⁵³ *Percy v. Millaudon*, 8 Martin (La., N. S.) 68.

⁵⁴ Stat. 1841, *Jose v. Hewett*, 50 Me. 248.

⁵⁵ *Grant Co. Dep. Bank v. Littell*, 108 Ky. 442; *Tapley v. Martin*, 116 Mass. 275; *Bostwick v. Van Voorhis*, 91 N. Y. 353; *Wayne v. Commercial Nat. Bank*, 52 Pa. 343; *Conn. Life Ins. Co. v. Scott*, 81 Ky. 540; *Amherst Bank v. Root*, 2 Met. (Mass.) 522, 541; *Lieberhan v. First Nat. Bank*, 2 Penn. (Del.) 416, affg. 40 At. 383; *Phillips v. Bossard*, 35 Fed. 100; *Franklin Bank v. Stevens*, 39 Me. 532; *Ashuelot Sav. Bank v. Albee*, 63 N. H. 152.

The leading case opposing this rule is *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23. See *Deposit Bank v. Hearne*, 20 Ky. L. Rep. 1019. "A surety is not liable on the bond of a cashier who has overdrawn his account to a large amount for several years, and the slightest attention from the directors to the business of the bank should have apprised them of the fact." *Grant Co. Deposit Bank v. Points*, 56 S. W. (Ky.) 662, 664.

with the surety, unless mentioned therein; they are directory to the bank managers.⁵⁶ This principle, however, must not be too extended, for by-laws pertaining to the giving of bonds must be regarded as clearly as provisions in a bank's charter, or the general statutes.⁵⁷

Is a surety liable for a defalcation that has actually happened, before incurring the engagement, which is known only to the evil doer? Surely he would not be if the directors had been grossly negligent in not discovering the truth,⁵⁸ or had concealed it;⁵⁹ otherwise the surety is bound.

(o.) A bond generally requires "immediate" notice of the flight and defalcation of an officer. If no notice is given for ten days after the period when an officer should report for duty, the question is one of fact, whether the requirement has been fulfilled.⁶⁰ And a provision in the bond of a teller requiring the bank to notify the surety on "becoming aware of the teller being engaged in speculation or gambling," is a reasonable requirement, which the bank should carefully heed, otherwise it cannot recover should the teller prove a victim like so many other bank officers who have dared to venture. The proviso is explicit and intended to be, and no promise of an officer who is speculating to quit or reform, will justify the bank in not notifying the company. Costly experience has taught insuring companies the need of knowing, and it is not for the bank to judge when they "become aware" that an officer is thus

56 *Louisiana State Bank v. Ledoux*, 3 La. Ann. 675; *Pittsburg & Chicago R. v. Shaeffer*, 59 Pa. 350, 357.

57 *Danvers' Elevator Co. v. Johnson*, 93 Minn. 323.

58 *Deposit Bank v. Hearne*, 20 Ky. L. Rep. 1019; *Wayne v. Commercial Nat. Bank*, 52 Pa. 343.

59 *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23; *Franklin Bank v. Cooper*, 36 Me. 179. A Conn. statute provides that the treasurer of every savings bank shall give a bond acceptable to the directors. The duty imposed on them by this statute is to accept or reject it. Their failure to inform the sureties at the time the bond was given that the treasurer had embezzled funds, of which they had knowledge, did not release the sureties. *Watertown Sav. Bank v. Mattoon*, 62 At. (Conn.) 622.

60 *Fidelity & Casualty Co. v. Bank of Timmons ville*, 139 Fed. 101.

conducting whether the insuring company should be informed or not.⁶¹

A bank that is required to give notice of any default or loss by an employee, need not notify the surety of overdrafts on his personal account so long as no evil intent on his part was known in making them.⁶² Furthermore, though other unfaithful officers of a bank know and connive at the infidelity of a particular officer, his sureties are not thereby relieved from responsibility for him. Says Justice Sharswood: "They undertake that he shall be honest, though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences can be sound."⁶³

In some matters bank officials often possess discretionary power with respect to notifying sureties. In cases of default a notification within a reasonable time after its discovery, unless a more specific time is prescribed in the bank, is a sufficient compliance with the agreement of immediate notice.⁶⁴ Whether the compliance is prompt enough to meet the requirements of the bond is a fact that must be largely determined by the circumstances in every case.⁶⁵

(p.) In an action against sureties to recover for the wrongdoing of the insured, for his failure to enter a true account of the money in his possession, the proper proof must appear.

61 *Guarantee Co. v. Mechanics' Sav. Bank*, 183 U. S. 402, revg. 100 Fed. 559; first appeal, 173 U. S. 587, revg. 47 U. S. App. 91.

62 *Fidelity & Dep. Co. v. Courteney*, 43 C. C. A. 331. The application of property conveyed by a defaulting officer to his bank to cover a defalcation cannot be claimed by his surety in discharge of his liability for the officer's embezzlement unknown to the bank at the time of the conveyance. *Grocers' Bank v. Kingman*, 16 Gray (Mass.) 473.

63 *Pittsburg & Chicago R. v. Shaeffer*, 59 Pa. 350, 357; *Fidelity & Casualty Co. v. Gate City Nat. Bank*, 97 Ga. 634, 639; *Taylor v. Bank*, 2 J. J. Marsh. (Ky.) 564; *United States v. Vanzandt*, 11 Wheat. (U. S.) 184; *American Bonding Co. v. Spokane Building Assn.*, 65 C. C. A. 121; *McShane v. Howard Bank*, 73 Md. 136.

64 *Bank of Tarboro v. Fidelity & Deposit Co.*, 128 N. C. 366.

65 *First Nat. Bank v. Fidelity & Guaranty Co.*, 110 Tenn. 10.

And if the parties who made the entries are dead, this fact must be shown before secondary evidence can be adduced in proof.⁶⁶

Sometimes the sureties are granted a delay in its enforcement to realize on the collaterals of the person insured. When this is done the consent of one of the sureties to changes in the disposition of them, extensions of time, renewals, and compromises are binding on all the sureties, and none can claim a release by such action granted to one of their number.⁶⁷

(q.) When can a surety avail himself of the statutory defence of time? Pleased, indeed, would a surety be if it began to run in all cases from the commission of his principal's offence, but this is not the rule whenever the fraud has been concealed. The statute is active in the daylight against open, known wrongs; it does not run against secret ones until their discovery.⁶⁸

(r.) Beside the foregoing defences by sureties, some others may be mentioned. Of these the most frequently attempted, though generally in vain, is negligence exercised by the board

66 *State Bank v. Brown*, 165 N. Y. 216, the court citing *Ocean Nat. Bank v. Carll*, 55 N. Y. 440; *White v. Ambler*, 8 N. Y. 170; *Bank v. Culver*, 2 Hill (N. Y.) 531; *Brewster v. Doane*, 2 Hill 537. The court added that the case should not be confounded with those which authorize books to be read after a proper foundation has been laid, and cited *Matter of McGoldrick v. Traphagen*, 88 N. Y. 334; *First Nat. Bank v. Tisdale*, 84 N. Y. 655; *Smith v. Smith*, 163 N. Y. 168; *Vosburgh v. Thayer*, 12 Johns. (N. Y.) 461. The bondsmen of a cashier who make good his shortage are subrogated to the right of the bank against those concerned with the cashier in his misdoings. *Grain Exchange v. Bendiger*, 48 C. C. A. 726; *Mendel v. Boyd*, 91 N. W. (Neb.) 860. In an action on a cashier's bond a memorandum of the examination of the cashier before the directors prior to the suit is competent evidence. *Bank v. Fidelity & Deposit Co.*, 128 N. C. 366. A surety company defended against a bond given by an employee, whose defalcation consisted in raising checks, that the obligee had a remedy against the bank that paid the checks. But this did not avail. "The surety company was not only an insurer, but in some sort a surety as well and in both these capacities its liability is primary and direct." *Champion Ice Co. v. Am. Bonding & Trust Co.*, 25 Ky. L. Rep. 239.

67 *State Loan & Trust Co. v. Cochran*, 130 Cal. 245.

68 *Lieberman v. Bank of Wilmington*, 2 Penn. (Del.) 416. See Ch. VIII. §40.

of directors. As bonds are usually written, conditioned for the faithful performance of the duties of the principal, sureties are not relieved by the negligence of directors⁶⁹ unless it is stamped with fraud or bad faith;⁷⁰ nor will the acts of ordinary agents or employees, conniving at, or co-operating with a bonded employee who has violated his duty be imputed to the bank. The attempt to transform an embezzlement into a loan, while sometimes displaying some imagination rarely succeeds as a legal defence.⁷¹ And if a note is discounted by an officer in violation of his bond, the bank, by attempting to collect the note, is not thereby estopped from pursuing his sureties.⁷² Nor will the failure of a bank to set off the salary due to a defaulting officer against his indebtedness release the sureties on his bond.⁷³

Lastly may be considered the effect of releasing joint defaulters under different conditions. Thus if a president and cashier are both wrong-doers, the release of the president from his liability does not operate to release the sureties on the bond of the cashier.⁷⁴ And a release by the president of the sureties on the cashier's bond for his default would be clearly beyond his authority and therefore worthless.⁷⁵

The amount that may be recovered is the sum total of the principal's defalcation with interest on each sum embezzled from the time it was taken.⁷⁶

(s.) One more question remains for consideration, how far

69 *Fidelity & Dep. Co. v. Courtney*, 186 U. S. 342, 360; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *Taylor v. Bank of Ky.*, 2 J. J. Marsh. (Ky.) 564; *Atlas Bank v. Brownell*, 9 R. I. 168; *Amherst Bank v. Root*, 2 Met. (Mass.) 522; *Louisiana State Bank v. Ledoux*, 3 La. Ann. 674; *McTaggart v. Watson*, 3 Cl. & Fin. (Eng.) 536; *Pittsburg & Chicago R. v. Shaeffer*, 59 Pa. 350, 357.

70 *Ibid.*

71 *McShane v. Howard Bank*, 73 Md. 136. See *Ida Co. Sav. Bank v. Seidensticker*, 128 Iowa 54.

72 *Cassel v. Mercer Nat. Bank*, 22 Ky. L. Rep. 1009.

73 *McShane v. Howard Bank*, 73 Md. 136.

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

can a banking firm change its membership and yet preserve the life and integrity of these instruments? Every one knows that changes are not infrequent; the larger the membership, the more frequent the changes. The true answer is, so long as the identity of the firm exists, the parties to a bond remain bound.⁷⁷ In like manner, the conversion of a state to a national bank, or vice versa, does not change the identity of a corporation;⁷⁸ but the identity of a partnership is destroyed by conversion into a corporation, and the life of a bond given to the former is thereby destroyed.⁷⁹

4. Compensation, How Fixed.

The compensation of the chief officers is fixed usually by resolution or agreement of the directors,⁸⁰ or by-law of the stockholders.⁸¹

(a.) Unless thus fixed, they are entitled to no compensation for performing the ordinary duties of their office.⁸² And once fixed in this manner, no increase for a past service, however valuable, can be allowed.⁸³ This was the older law, which has been somewhat modified, as will soon appear. Just dis-

77 *Metcalf v. Bruin*, 12 East (Eng.) 400; *Barclay v. Lucas*, 3 Doug. (Eng.) 321; *Wright v. Russel*, 3 Wils. (Eng.) 530.

78 *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, and cases cited.

79 *Bensinger v. Wren*, 100 Pa. 500.

80 See Chap. VIII. §12. *Grundy v. Pine Hill Coal Co.*, 9 S. W. (Ky.) 414. See 2 *Cooke on Corp.* §657.

81 See *Ellis v. Ward*, 137 Ill. 509; *McNulta v. Corn Belt Bank*, 164 Ill. 427.

82 *Blue v. Capital Nat. Bank*, 145 Ind. 518, 521, 522 and cases cited; *Citizens' Nat. Bank v. Elliott*, 55 Iowa 104 and cases cited; *Wood's Sons Co. v. Schaeffer*, 173 Mass. 443; *Holland v. Lewiston Falls Bank*, 52 Me. 564; *Loan Association v. Stonemetz*, 29 Pa. 534; *Crumlish v. Central Imp. Co.*, 38 W. Va. 390; *Ravenswood R. Co. v. Woodyard*, 46 W. Va. 558. "As the law does not imply an agreement to pay for such services, in order for him to recover compensation for them, he must at least show an antecedent, valid agreement to pay for them." *Blue case*, 145 Ind. 522.

83 *Ellis v. Ward*, 137 Ill. 509; *Carr v. Chartiers Coal Co.*, 25 Pa. 337. A president cannot charge for guaranteeing its paper without showing a clear and explicit agreement to that effect, made with the proper authorities. *Leavitt v. Beers*, *Lalor Supp.* (N. Y.) 221.

tinctions are drawn in its application to directors and other officers.

(b.) Keeping in mind that the principal difficulties arise in cases wherein no statute, resolution, by-law or agreement has fixed the compensation of an officer contemporaneously with, or in advance of, performing the service, let us first inquire how the old rule applies to directors. With respect to them it remains essentially unchanged. They are not entitled to compensation for services performed in their directorial capacity without "a pre-existing condition expressly giving right to it."⁸⁴ While serving as directors, they are not thereby disqualified from receiving compensation for acting in another capacity, so long as they do not use their directorial authority unduly to compensate themselves.⁸⁵

(c.) Passing to the managing officers, for the purpose of this inquiry they may be put into three classes: (1) Those who accept office expecting to perform without compensation the usual duties; (2) those who are promised, and expect to receive, a compensation for the unusual duties pertaining thereto; (3) and those who would not accept office and perform its duties without expecting to receive a reasonable compensation.

The first class are entitled to no compensation,⁸⁶ for as they

84 *Mather v. Eureka Mower Co.*, 118 N. Y. 629. "To permit them to assert claims for services performed and then support them by resolution, would enable the directors to appropriate unduly the fruits of corporate enterprise. It would clearly be contrary to sound policy. The same reason may not exist for the application of the rule to a stockholder not a director, who has become an officer of the corporation." *Ibid*, 632, citing cases; *Taussig v. St. Louis R.*, 116 Mo. 28; *Hall v. Vt. & Mass. R.*, 28 Vt. 401; *Dunston v. Imperial Gas Light Co.*, 3 Barn. & Ad. (Eng.) 125.

85 *First Nat. Bank v. Drake*, 29 Kan. 311; *Godbold v. Branch Bank*, 11 Ala. 191; *Rogers v. Hastings R.*, 22 Minn. 25; *Ten Eyck v. Pontiac R. Co.*, 74 Mich. 226; *Chandler v. Monmouth Bank*, 13 N. J. Law. 255; *Hall v. Vt. & Mass. R.*, 28 Vt. 401; *Taussig v. St. Louis R.*, 166 Mo. 28. See *Gill v. N. Y. Cab Co.*, 48 Hun (N. Y.) 524.

86 *Pew v. First Nat. Bank*, 130 Mass. 391; *Sawyer v. Pawner's Bank*, 6 Allen (Mass.) 207; *Blue v. Capital Nat. Bank*, 145 Ind. 518; *Fitzgerald Construction Co. v. Gerald*, 137 U. S. 98, 111; *Farmers' Loan & Trust Co.*, 152 N. Y. 251, 254; *Mather v. Eureka Mower Co.*, 118 N. Y.

do not expect to receive anything, the mere fact that valuable services are rendered for the benefit of a party does not make him liable upon an implied promise to pay for them.⁸⁷

The second class may receive a reasonable compensation for their unusual or extraordinary service if this has been promised to them, and the service has been rendered with the expectation of receiving it;⁸⁸ otherwise they cannot.⁸⁹

We do not perceive any difference in the application of the principle to an unusual service performed in immediate connection with an office, for example, the erection-superintendency of a banking office by the president of a bank, or the remoter connection of attorney to conduct a suit in behalf of the institution. The statute, by-law or common law forbidding remuneration for the usual service performed by the director or managing officer is not aimed against an unusual, necessary service. Said the Supreme Court of New Jersey more than seventy years ago: "The sound construction [of such a prohi-

629, affg. 44 Hun 333; *Holland v. Lewiston Falls Bank*, 52 Me. 564, 565; *Crumlish v. Central Imp. Co.*, 38 W. Va. 390; *Taussig v. St. Louis R.*, 166 Mo. 28; *Citizens' Nat. Bank v. Elliott*, 55 Iowa 104. "When an officer of a corporation performs the usual and ordinary duties of his office, as defined by the charter or by-laws, he cannot recover compensation therefor unless it has been especially agreed. He cannot, in such cases, recover what the services are reasonably worth." *Ibid*, 106.

87 *Sawyer v. Pawner's Bank*, 6 Allen (Mass.) 207; *Pew v. First Nat. Bank*, 130 Mass. 391, and this rule has been applied to a stockholder. *Sidway v. Mo. Land & Live Stock Co.*, 187 Mo. 649.

88 *Chicago Macaroni Co. v. Boggiano*, 202 Ill. 312, 317; *Severson v. Bi-Metallic Ex. M. Co.*, 18 Mont. 13; *Flynn v. Columbus Club*, 21 R. I. 534; *Citizens' Nat. Bank v. Elliott*, 55 Iowa 104, 107; *Zellerbach v. Allenberg*, 99 Cal. 57; *Ruby Mining Co. v. Prentice*, 25 Colo. 4; *Baines v. Coos Bay Nav. Co.*, 165 N. Y. 179; *Bagely v. Carthage R.*, 165 N. Y. 179, affg. 25 App. Div. 475; *Aull Sav. Bank v. Aull*, 8 Mo. 199, 202. "Where services are rendered to a corporation by one of its officers, which are clearly outside of his official duties, a recovery may be had therefor under implied contract, if the circumstances be such as to fairly imply that it was expected that the services were to be paid for." *Lowe v. Ring*, 106 Wis. 647, s. c. 115 Wis. 575, 579.

89 Cases in note 7. Also *Gill v. N. Y. Cab Co.*, 48 Hun (N. Y.) 524. A bank cashier cannot demand anything from a depositor for collecting dividends and coupons except by agreement. *Wright v. Sheldon*, 24 R. T.—

bition] does not require the exclusion of the individuals of the board from a just compensation of a different character, merely because they were rendered *while* they were directors."⁹⁰

In the third class of cases, unless a positive rule forbids, compensation may be paid and received, for this was the intent and expectation of the parties.⁹¹ Nor does any rule require that the compensation must be fixed either before or immediately after the acceptance of office; so long as directors act in good faith, and vote only a reasonable compensation, they may act at any time, even after the close of the term of service.⁹²

(d.) An officer's right to recover has sometimes turned on the fact whether he was a member of the directory or not. In New York especially the right has been denied when this relationship existed between him and the compensating authority, though readily admitted in other cases.⁹³ Elsewhere this relationship has not been so fatal to his recovery.⁹⁴ All agree that directors should act in the best faith in discharging this delicate matter.⁹⁵ As the president, and often the vice-president and cashier, are members of the directory, the authority of the board to act on the question of compensating one or all of these officers may be rightfully questioned when they form a majority or possess undue authority over their colleagues;⁹⁶

⁹⁰ *Chandler v. Monmouth Bank*, 13 N. J. Law 255, 260; *Bagley v. Carthage R.*, 165 N. Y. 179.

⁹¹ *Bartlett v. Mystic River Corporation*, 151 Mass. 433; *Fitzgerald Construction Co. v. Fitzgerald*, 137 U. S. 98, 111; *Bassett v. Fairchild*, 132 Cal. 367, citing many cases; *Rogers v. Hastings R.*, 22 Minn. 25; *Clark v. Am. Coal Co.*, 86 Iowa 436; *Stacy v. Cherokee Foundry*, 70 S. C. 178.

⁹² *First Nat. Bank v. Drake*, 29 Kan. 311, 330. This case contains an elaborate discussion of the subject by Justice Brewer. See *Grundy v. Pine Hill Coal Co.*, 9 S. W. (Ky.) 414; *Waller v. Bank of Ky.*, 3 J. J. Marsh. (Ky.) 201, 206.

Contra.—*Ellis v. Ward*, 137 Ill. 509.

⁹³ *Gill v. N. Y. Cab Co.*, 48 Hun (N. Y.) 524; *Smith v. Long Island R.*, 102 N. Y. 190; *Mallory v. Mallory Wheeler Co.*, 61 Conn. 131.

⁹⁴ *Clark v. American Coal Co.*, 86 Iowa 436.

⁹⁵ *Mallory v. Mallory Wheeler Co.*, 61 Conn. 131.

⁹⁶ *Ibid.* *McNulta v. Corn Belt Bank*, 164 Ill. 427. In this case the

and the fear perhaps that they will thus act is doubtless the reason for denying to a board, as some courts have done, the right to act in all cases when any one of their number is subject to the board's action. Ought not the question to be resolved into one of fact, and the authority of the board to depend on the ability of its members to act fairly and independently of those who are seeking compensation through the action of their colleagues. If there is an independent majority of the board outside, for example, of the president who is seeking for a reward, why should they not be permitted to act as freely as they now act on a loan application by the members of their own board?⁹⁷ On the other hand, if his presence is needful to make a quorum, surely the board is not legally formed for action on a matter wherein he has a direct interest.⁹⁸ The important question in all these cases is, or should be, is the bank fairly represented outside and independently of the applicants, and thereby faithfully conserving the interests of the stockholders?

(e.) The vice-president of a bank whose by-laws contain no provision for remunerating him can charge none, even though he acts as president, and is thus required to act during the other's absence.⁹⁹

(f.) Again, a president ready to perform his duties, whose salary is fixed at an annual sum, is entitled to the full amount though prevented without his fault from performing them, or is absent without leave.¹ Likewise a bank clerk who is discharged while on a vacation, during which he was to receive full pay, is entitled to his salary until the time of his discharge,

distinction between a bonus and a salary was considered and the right to vote the former to the president in addition to his salary.

97 See *Clark v. American Coal Co.*, 86 Iowa 436.

98 *Bassett v. Fairchild*, 132 Cal. 637.

99 *Citizens' Nat. Bank v. Elliott*, 55 Iowa 104; *Blue v. Capital Nat. Bank*, 145 Ind. 518; *Brown v. Galveston Wharf Co.*, 92 Tex. 520. See *Gill v. N. Y. Cab Co.*, 48 Hun (N. Y.) 524.

1 *Brown v. Galveston Wharf Co.*, 92 Tex. 520; *Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536; *People v. Smyth*, 28 Cal. 21; *Carroll v. Sieben-thaler*, 37 Cal. 193. See *Mayor v. Woodward*, 12 Heisk. (Tenn.) 499.

notwithstanding his employment was from month to month and the bank had a right by statute to discharge him at any time. Nor can an agreement to pay him a salary during his vacation be treated as a gift and therefore not based on a sufficient consideration.²

(g.) On the other hand, a salary fixed by by-law or resolution before one's acceptance of office cannot be changed without good reason during his period of service, without his consent.³ His willingness to serve, it is presumed, is based partly at least on the compensation he is to receive; this element of the contract is as essential as any other, even should a by-law provide that the directors may fix all salaries.⁴

(h.) The vote of a board purporting to fix the salary of their president or other officer must be known and approved or accepted by him to form a contract.⁵ Furthermore, it may be shown by real evidence that an offer of the salary was made and accepted or declined.⁶

An agreement concerning one's service must be fairly executed, or he cannot claim the compensation. Thus a man who agrees to serve as bank president for a specified sum and to give the institution two-thirds of his time during banking hours, who fails to execute it, can recover nothing.⁷ Moreover a board, acting within the scope of its authority and for

2 *Birch v. Glasgow Sav. Bank*, 90 S. W. (Kan. City App.) 746.

3 For example, his removal for a good reason. *Jones v. Johnson*, 86 Ky. 530.

4 *Banigan v. U. S. Rubber Co.*, 22 R. I. 452. See *Eagle Manuf. Co. v. Browne*, 58 Ga. 240; *Mo. River R. v. Richards*, 8 Kan. 101; *Rogers v. Hastings & Dakota R.*, 22 Minn. 25; *Grundy v. Pine Hill Coal Co.*, 9 S. W. 414.

His undrawn salary draws interest. *Boker's Estate*, 7 Phila. 479.

5 What acts or words suffice to form a contract between directors and an officer. *Pew v. Gloucester Nat. Bank*, 130 Mass. 391; *Sawyer v. Pawner's Bank*, 6 Allen (Mass.) 207; *Farmers' Loan & Trust Co. v. Housatonic R.*, 152 N. Y. 251; *Kimball v. N. E. Grate Co.*, 168 Mass. 32; *Leavitt v. Beers*, Lalor Supp. (N. Y.) 221, 227.

6 *Sears v. Kings Co. R.*, 152 Mass. 151.

7 *Lapsley v. Merchants' Bank*, 105 Mo. App. 98. See *Johnson v. Stoughton Wagon Co.*, 95 N. W. (Wis.) 394.

a good reason, may discharge an officer, who cannot recover compensation from the time of the last payment; nor is the action of the board reviewable by a court in a legal proceeding to recover his salary.⁸ Lastly, the contract of employment may be shown by parol evidence whenever the minutes of the meeting of the directors fail to disclose the terms of it.⁹

(i.) A company's president, who is authorized to act as a receiver, is not thereby forbidden to thus act in his individual capacity; nor is he, when thus acting, obliged to account for his compensation to his company on the ground that it is entitled to his entire service.¹⁰ Of course, his relations might be so defined by agreement or by-laws of the company as to command his full powers.

(j.) Should a bank become insolvent and the president be appointed a receiver, he cannot continue to draw his presidential salary, nor in truth can any of the officers continue to draw theirs.¹¹ But they may prove their claims for salaries like other creditors.¹²

5. Similarity of Authority of Managing Officers.

Formerly, the line of division in the exercise of authority by president and cashier was distinct; now, excepting a few statutory requirements, their official authority is often blended, and there is no longer any essential difference in the authority exercised by them. The chief difference is territorial.

In the larger cities the president is often the manager; in some cases, the vice-president; in others, the cashier; in others, so far as the outside world is concerned, several of the leading officers possess co-authority to transact the bank's business, which is performed by one or another in accordance with a gen-

8 Seeley v. Am. Lubricator Co., 119 Iowa 59.

9 Ibid; Ten Eyck v. Pontiac R. Co., 74 Mich. 226; Kalamazoo Novelty Works, 40 Mich. 84.

10 Citizens' Trust & Deposit Co. v. Tompkins, 97 Md. 12.

11 Lenoir v. Linville Imp. Co., 126 N. C. 922; Thompson v. Willamette Mfg. Co., 15 Or. 604.

Contra.—Spader v. Mural Decoration Mfg. Co., 47 N. J. Eq. 18.

12 Re Dale, L. R. 43 Ch. Div. (Eng.) 255.

eral plan known by themselves.¹³ Thus acting as a unit, and interchanging constantly their work, it is no longer possible nor desirable to continue the sharper limitations on the authority that once existed between them. Outside the larger cities the president still continues to be the nominal head only of many banking institutions. It may be added that all officers are agents of the bank, and not of the directors.¹⁴

The real head and manager, says a recent judicial authority, "to represent and bind the corporation may be implied from the manner in which he has been permitted by the trustees or directors of the corporation to transact its business. The acting head of the corporation, whether it is the president, vice-president, cashier or general manager, through whom, and by whom, the general and usual affairs of the corporation are transacted which custom or necessity has imposed upon the officer, such acts being incident to the execution of the trust reposed in him,—may be performed by him without express authority; and in such cases it is immaterial whether such authority exist by virtue of his office, or is imposed by the course of business as conducted by the corporation."¹⁵

13 See §12.

14 *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 650; *Baldwin v. Bank*, 1 Wall. 234; *Martin v. Webb*, 110 U. S. 7; *Asher v. Sutton*, 31 Kan. 286; *Badger v. Bank*, 26 Me. 428; *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9; *Bank v. Schuylkill Bank*, 1 Pars. Eq. Cases (Pa.) 180; *Bissell v. First Nat. Bank*, 69 Pa. 415. "If a cashier be allowed to exercise general authority in respect to the business of the bank for a considerable time,—in other words, if he is held out to the public as having authority in the premises,—the bank is bound by his acts, as in case of an agent of any other corporation, by whatever name he may be designated, in the same manner as if authority were expressly granted. The directorate of a bank cannot be permitted to neglect its duties, abandon the management to the cashier, permit him openly, notoriously and without rebuke to deal with the public as having authority, and then escape responsibility." *McGrath*, Ch. J., *Wing v. Commercial & Sav. Bank*, 103 Mich. 565, 576.

15 *Hawley, J., Cox v. Robinson*, 27 C. C. A., 120, 126, citing many cases. "Where the entire control of the affairs of the corporation has been abandoned to one of its officers, it will be presumed that he is authorized by the corporation to do any act that the corporation might lawfully do, and the acts of such officer in transacting the business of the corporation

The authority of the president and cashier has its origin in six sources: It may come from statute or charter; it may be expressly conferred by the directors; it may come from independent action subsequently ratified by the directors; by usage; it may be inherent; lastly, it may come from necessity.

6. Requirements.

So far as the statutes prescribe specific provinces of authority and duty between them, of course, these must be observed. Beyond there are no unalterable limitations.

7. Authority Determined by Practice and Usage.

Their exercise of authority is largely determined by practice and usage; in other words, they are governed by the most general law of agency. Every person, therefore, who transacts business with them is safe in relying on this rule, unless he knows of restrictions in its boundaries.¹⁶ On the other hand, when officers go beyond, it is the duty of any one who is transacting business with them to know by what authority

need no authorization or ratification from a nominal board of directors." Bartholomew, Ch. J., in *Tourtlot v. Whithed*, 9 N. Dak. 467, 474, citing *Washington Sav. Bank v. Butchers & Drovers' Bank*, 107 Mo. 133; *Kraniger v. People's Building Society*, 60 Minn. 94; *Martin v. Webb*, 110 U. S. 7; *Calvert v. Idaho Stage Co.*, 25 Or. 412; *Ceeder v. Loud Lumber Co.*, 86 Mich. 541.

16 *Bates v. Bank of the State*, 2 Ala. 451; *Savannah Bank & Trust Co. v. Hartridge*, 73 Ga. 223; *Durkee v. People*, 155 Ill. 354; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560; *Nicollet Nat. Bank v. Frisk-Turner Co.*, 71 Minn. 413; *Neiffer v. Bank*, 1 Head (Tenn.) 162; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135; *Citizens' Sav. Bank v. Blakesley*, 42 Ohio St. 645; *Lloyd v. West Branch Bank*, 18 Pa. 172; *Fleckner v. Bank*, 8 Wheat. (U. S.) 338; *Martin v. Webb*, 110 U. S. 7; *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557; *United States v. City Bank*, 21 How. (U. S.) 356; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *Matthew v. Mass. Nat. Bank*, 1 Holmes (U. S.) 396. "It is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time." *Bank v. American & Dist. Tel. Co.*, 143 N. Y. 559, 564. The execution of a deed by a cashier was shown to have been proper by proof of approval by the bank's attorney, who was one of the directors, by their invariable acquiescence in similar transactions; and by the cashier's testimony of their approval. *Whitney v. Foster*, 117 Mich. 643.

their sphere of action has been extended.¹⁷ So long as they act within the realm of the bank, an outsider is safe enough in contracting with them; but it is his duty to ascertain the true boundary; and if he ventures into the forbidden enclosure, the law plainly tells him beware. Ignorance or good intention will not protect him in going there. An officer may lure him thither, but this is no defence. He ought not to go before assuring himself of the officer's authority to act. Thus an individual has no right to make a contract between himself and a bank officer in which the bank clearly has an interest opposed to that of the officer himself. The impropriety of such action ought to be apparent to the darkest mind. If, therefore, an individual engages with a bank officer in such transactions, whereby the bank is wronged, it is not prevented by the officer's representative position from seeking redress of the individual who has wrongfully profited at the bank's expense.¹⁸

There is a middle ground whereon the exercise of authority has not been of sufficient frequency to establish a usage. In many of these cases subsequent ratification by the directors removes all doubt of legality. In a smaller number the answer must depend on the results of the inquiry relating to the facts pertaining to each transaction.

8. When is Entire Authority Conferred on Them.

Sometimes a bank endows a managing officer with entire authority, or its open and continuous exercise by him creates the general belief that it is co-extensive with the authority that can be exercised by the bank or board. When this belief is created, a bank is clearly responsible for the conduct of such an officer. For, as some one is likely to be injured by such limitless authority, and sooner or later in most cases this hap-

17 *Farmers' & Mech. Bank v. Butchers' & Drov. Bank*, 16 N. Y. 125, 132; *National State Bank v. Vigo Co. Nat. Bank*, 141 Ind. 352; *Reed v. Powell*, 11 Rob. (La.) 98.

18 *Campbell v. Manufacturers' Nat. Bank*, 67 N. J. Law 301; *Clafin v. Farmers' Bank*, 25 N. Y. 293; *Lamson v. Beard*, 36 C. C. A. 56. For a good statement of the law, see *Hier v. Miller*, 75 Pac. (Kan.) 77.

pens, the bank, and not the unsuspecting creditor, must be the sufferer. This is the least penalty a bank can be required to suffer from confiding all its power to an individual.¹⁹

19 "An officer of a corporation, having the general management of its business, may, with the knowledge and acquiescence of the directors, or with their subsequent acquiescence, enter into any contract necessary or usual in the course of the business for which the corporation was created, if reasonably incident thereto, without authority first being given therefor by formal vote of the directors, and that such authority may be inferred from the conduct of the directors, or from their knowledge of the facts and a failure to make objection." *Cassaday, Ch. J., Lowe v. Ring*, 115 Wis. 575, 581, citing *Ford v. Hill*, 92 Wis. 188, 195; *Northwestern Fuel Co. v. Lee*, 102 Wis. 426, 430. In one of the latest cases, *Smith v. Bank*, 54 At. (N. H. 385, 387), the court declared: "As between a corporation and innocent third parties who have dealt with its agents, authority may sometimes be inferred from a course of dealing," citing many cases. A bank whose directors have for several years entrusted the entire management of the bank to the cashier is liable upon his endorsement in its behalf of paper negotiated by him as the bank's property in the usual course of business. *First Nat. Bank v. Stone*, 106 Mich. 367. A president was fully authorized to execute a building contract. Some of the payments ordered by him were in violation of it, which required them to be made only on certificates of the architect. Nevertheless the bank was bound by them. *First Nat. Bank v. Fidelity & Deposit Co.*, 40 So. (Ala.) 415.

"The idea that every time a person deals with the officer of a corporation or person assuming to act in its behalf, he must under all circumstances take his chances on whether such officer or person has been specially authorized in regard to the matter, has no place in the law of our day. Proof of apparent authority of a corporate officer to contract in its behalf *prima facie* establishes actual authority so to do, and mere want of authority in fact will not relieve a corporation from the burden of a contract made in reasonable reliance upon such appearance of authority. What will sufficiently evidence apparent authority of the president of a corporation to make a contract in its name must be considered with reference to the character of the business involved, common knowledge of the manner in which corporate business is usually carried on, and many other circumstances,—significant among them the fact that it has come to pass that the president of a business corporation almost universally exercises the powers of a general agent for his company." *Marshall, J., St. Clair v. Rutledge*, 115 Wis. 583, 591. "While a president or other officer of a corporation may have no authority by virtue of his office, or by express sanction of the board of directors to incur obligations in behalf of the corporation, yet if he is held out by the managers in the general course of business as being the agent of the corporation with such authority, his acts incurring obligations will be binding upon the corporation." *Evansville Public Hall Co. v. Bank of Commerce*, 144 Ind. 34; *Fifth Ward Sav. Bank v. First Nat.*

In the final analysis, therefore, the following principles come into full view:

(a.) A person contracting with an officer who is acting within the scope of his authority need only know that he is thus acting in order to understand what rules apply to him. An applicant for a loan to an officer who is a general manager knows that he has authority to make it, and if the application is granted, the bank is bound by its officer's action.

(b.) When an officer is acting by virtue of special authority, for example, in certifying his own check or lending to himself, it behooves the person who takes the check or the money obtained from the loan to know the officer's authority for doing these things. Such acts are after all only the application of the oldest principles of agency.

(c.) An officer may, as we have seen, be entrusted with all the authority a bank possesses, and in some cases it is actually given up to him. When this is done, he is a general agent of unlimited authority and the bank is responsible for almost all his acts. Special authority is blended with the general, and the bank becomes responsible for all. If this be a sweeping rule, it is the only just rule for endowing or permitting him to constitute himself the bank.

(d.) In other cases the special authority of an officer is widening and blending into general authority. Its extent in such cases must be determined by inquiry. The rules that apply are not difficult after the facts have been ascertained.

Bank, 47 N. J. Eq., 357. See note 14 L. R. A. 356. The authority of a cashier may be "inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years, or in numerous business transactions, he has been permitted without objection, and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations." *Martin v. Webb*, 110 U. S. 7, 14.

9. Boundary of Authority Between Directors and Managing Officers.

The exercise of a bank's authority is divided between the directors and managing officers; and, to some extent, the statute has defined the line between them. The tendency on the part of directors is to lessen their functions and to increase those of the managing officers. The discounting of paper, which was once regarded as the most important directorial function of all, is largely confided to one or more managing officers, or to a committee composed of three or more directors.²⁰ In some places the old rule in nearly all its rigor is preserved, especially among the country banks. So long as no positive law is disregarded, this shifting of authority from the directory to the managers is legal.²¹ What, therefore, is the province or function of a managing officer is often not a general question, but a narrower local one,—a question of fact to be ascertained like any other question of a similar character.

Thus the chief authority and duty of a president besides pre-

²⁰ *Warner v. Penoyer*, 33 C. C. A. 222; *Clews v. Bardon*, 36 Fed. 617. See Chap. VIII. §32.

²¹ *Warren v. Robison*, 19 Utah 289, 300. In *Cunningham v. German Ins. Bank*, 101 Fed. 977, 980, *Severens*, Cir. J., said: "Where, by the direction or acquiescence of the stockholders, the executive officers of a corporation assume and exercise the functions of the board of directors, the corporation and those deriving rights from it while it is so managing its affairs are bound by the acts of its officers to the same extent as if they had been directed by the board. In so far as the duties of the directors are not expressly prescribed by the charter, they derive their powers from the stockholders, who may, if they see fit, select other agencies for the transaction of the corporate business." In one of the latest cases "the directors appear to have given little attention to the management of the bank, and to have intrusted practically everything to this officer, and what he did within the scope of authority which might have been conferred would seem to be binding on the bank. If the cashier of a bank is permitted to exercise general authority with respect to its business for a considerable time—in other words, held out to the public as having authority in the premises—the bank is bound by his acts, as in the case of the agent of any other corporation in the same manner as if the authority were expressly conferred." *Sherwood v. Home Sav. Bank*, 109 N. W. 9, 11, citing *Wing v. Commercial & Sav. Bank*, 103 Mich. 565; *Fifth Ward Sav. Bank v. Nat. Bank*, 48 N. J. Law 513; *Martin v. Webb*, 110 U. S. 7. See §7.

siding at board meetings has been to act as pilot for his bank through the stormy seas of legal controversy. This duty has been repeated by the bench on numberless occasions.²² But if the bank employs counsel regularly, the president has no authority to employ special counsel without the sanction or ratification of the directors.²³

10. They Cannot Exceed Bank's Authority.

An officer's exercise of authority is limited to such contracts as his bank can lawfully make.²⁴ This is the *ne plus ultra*, beyond which he cannot go, however strongly fortified he may be by previous resolution or by subsequent approval.²⁵

To perform a duty, however, involves the power to employ the needful means, and the further power to decide what means to employ. "These implied secondary powers must be such as will probably subserve the end in view, and must lie within the bounds of right and reason."²⁶

11. Modes of Exceeding Official, but Not Bank's Authority.

An officer may act in several ways beyond, or outside his

22 *Hodge v. First Nat. Bank*, 22 Gratt. (Va.) 51; *Mumford v. Hawkins*, 5 Denio (N. Y.) 355; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496; *Citizens' Bank v. Berry*, 53 Kan. 696; *Savings Bank v. Benton*, 2 Met. (Ky.) 240; *Merchants' Nat. Bank v. Eustis*, 8 Tex. Civ. App. 350; *Western Bank v. Gilstrap*, 45 Mo. 419; *Streeten v. Robinson*, 102 Cal. 542, and cases cited.

23 *Pacific Bank v. Stone*, 121 Cal. 202.

24 *McCullough v. Moss*, 5 Denio (N. Y.) 567; *Central Bank v. Empire Stone Co.* 26 Barb. (N. Y.) 23; *Bank v. Patchin Bank*, 13 N. Y. 309, 315; *Downing v. Mt. Wash. Road Co.*, 40 N. H. 230.

25 *Minor v. Mechanics Bank*, 1 Pet. (U. S.) 46; *Bank v. Patterson*, 7 Cranch. (U. S.) 299; *Merchants Bank v. State Bank*, 10 Wall. (U. S.) 604; *Frankfort Bank v. Johnson*, 24 Me. 490; *Adriance v. Roome*, 52 Barb. (N. Y.) 399; *Lloyd v. West Branch Bank*, 15 Pa. 172, 174; *Citizens' Sav. Bank v. Blakesley*, 42 Ohio St. 645, 654; *Mt. Sterling Turnpike R. v. Looney*, 1 Met. (Ky.) 550, 551.

26 *Hill v. Bank of Seneca*, 87 Mo. App. 590, 600, citing many cases. "For what is warranted by general usage, or by the special usage of the party to be charged, or is manifestly necessary to the attainment of the desired object, the principal will be responsible unless the agent's freedom was restricted by known instructions." *Ibid.*

authority and yet within the authority of the bank. He may do so by express resolution;²⁷ or by such a course of continued action as to satisfy the public in believing that he is acting within the scope of his delegated authority.²⁸ On such occasions his bank is bound by his conduct, which is within the scope of the authority of the bank itself.²⁹

Again, an officer may bind his bank by doing an act within its apparent authority, though not within the authority conferred on him. Thus an officer may have authority to certify checks, but this is limited in all cases by the amount of money in the bank's possession belonging to the drawers. An officer may in fact certify for a larger amount, but if the holder of a check thus certified is innocent, is ignorant of the overcertification, not he, but the bank must suffer for the certifier's wrongful exercise of authority. In such a case "the bank is responsible instead of an innocent party upon every principle of reason and morality."³⁰

27 *National State Bank v. Sanford Fork Co.*, 157 Ind. 10; *National State Bank v. Vigo Co. Nat. Bank*, 141 Ind. 352. Authority to do an act may be conferred by the directors on their president "at a regular meeting of the board of directors, or by their separate assent, or by any other mode of doing such acts by individuals." *National State Bank v. Sanford Fork Co.*, 157 Ind. 10, 17, citing *Richardson v. St. Joseph Iron Co.*, 5 Blackf. (Ind.) 146; *Hamilton v. Newcastle R.*, 9 Ind. 359.

28 *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192; *Martin v. Webb*, 110 U. S. 7; *Commercial Mutual Ins. Co. v. Union Mutual Ins. Co.*, 19 How. (U. S.) 318; *First Nat. Bank v. New*, 146 Ind. 411, 418; *Evansville Public Hall Co. v. Bank*, 144 Ind. 34; *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law 513, 527. "A bank is liable for the fraud of its agent committed in the course of the bank's business, at least to the extent of the benefit received by it from the fraud." *Binghamton Trust Co. v. Auten*, 68 Ark. 299, 306, citing *Mackay v. Commercial Bank*, L. R. 5 P. C. App. (Eng.) 394; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. (Eng.) 259; *Swire v. Francis*, L. R. 3 App. Cas. (Eng.) 106; *Fishkill Sav. Institution v. National Bank*, 80 N. Y. 162.

29 "If the directors of a bank have for many years allowed the cashier to do all the business of the bank, they are held to have conferred on him authority to do everything which the charter or general law does not absolutely forbid a cashier to do, and his acts bind the bank." *Bakewell, J., Mercantile Bank v. McCarthy*, 7 Mo. App. 318, 325.

30 *Cooke v. State Nat. Bank*, 52 N. Y. 96, 115; *Farmers' & Mech. Bank*

On the other hand, he may act as an agent for another, for example, in receiving a deposit or security, or paying a note, and when thus acting his bank would not be liable for his private conduct.³¹

12. Sub-division of Authority Between Officers.

The outside public can hardly be supposed to know much concerning the subdivision of duties between bank officers. If a man stands at the receiving teller's place ready to do business, a customer may reasonably suppose he is rightfully there.³² If, therefore, he had no right to be in that place, the bank is none the less responsible for his conduct.³³

(a.) A vice-president may act in several ways. (1) He may be an active officer like the president or cashier, going daily to the bank. When thus acting, the bank is bound in the same way and to the same extent as though he were serving as a president or cashier. (2) He may be a mere nominal officer with no duties whatever so long as the president is in control. (3) Or, he may during the illness or absence of the president emerge from his enforced torpor. The graver questions touching his duty have arisen when thus acting as a substitute

v. Butchers' & Drov. Bank, 16 N. Y. 125; *New York & New Haven R. v. Schuyler*, 34 N. Y. 30. See §26.

³¹ *Manhattan Co. v. Lydig*, 4 Johns. (N. Y.) 377; *Thatcher v. Bank*, 5 Sand. (N. Y.) 121; *Leavitt v. Fisher*, 4 Duer (N. Y.) 1; *Peak v. Ellicott*, 30 Kan. 156; *Caldwell v. Nat. Mohawk Valley Bank*, 64 Barb. (N. Y.) 333; *Carr v. National Bank*, 167 N. Y. 375; *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, *affd.* 15 Fed. 141; *Citizens' Bank v. Fromholz*, 64 Neb. 284; *Markley v. Rhodes*, 59 Iowa 57. See *Campbell v. Manufacturers' Nat. Bank*, 67 N. J. Law 301; *Tremont Bank v. Estate of Paine*, 28 Vt. 24.

³² See *Second Nat. Bank v. Averell*, 2 App. Cas. (D. C.) 470, and *Manhattan Co. v. Lydig*, 4 Johns. (N. Y.) 377. See §5 and Chap. X. §2.

³³ Chap. X, §§2, 7. *Hotchkiss v. Artisans' Bank*, 2 Abb. Dec. (N. Y.) 403; *Sweet v. Barney*, 23 N. Y. 335. "Some officer, or agent, or employe of the bank receives daily large sums of money on deposit, for which the bank at once becomes liable, and yet no mention is made of any power in any officer or agent to receive such deposits." *Dickey, J., Libby v. Union Nat. Bank*, 99 Ill. 622, 630. The federal statute relating to certifying cannot be abrogated by any division of duties between officers. *Spurr v. United States*, 87 Fed. 701.

for the president. Instead of filling his place entirely, which is perhaps the common view, he more often possesses only the authority given to him by statute and common law, and by the by-laws or special resolutions of the directors.³⁴

(b.) Again, it should be remembered that officers having the same title do not possess the same authority in different kinds of corporations. The secretary or treasurer of a railway is not a very important officer; the secretary of a trust company, or treasurer of a savings bank may be the real manager.³⁵

13. Officers Must Act Within the Bank.

An officer must do the business of his bank at its place of business.³⁶ Yet this is not strictly true,³⁷ for some things must sometimes be done away from his bank.³⁸ Thus he may

34 See *National State Bank v. Sandford Fork Co.*, 157 Ind. 10.

35 The Supreme Court of Iowa remarked in a recent case concerning the authority of the secretary of a trust company: "The business of the loan and trust company was such that larger powers were necessarily implied in its secretary than if it had been organized to carry on some ordinary mercantile pursuit. The duties of a secretary were quite like those of a cashier in an ordinary banking institution. Such an officer has power to pay checks, negotiate loans, discount paper, extend the time of payment of notes and bind his bank by various other acts." *Deemer, J., First Nat. Bank v. Garretson*, 107 Iowa 196, 203.

36 *Sturdevant v. Farmers' & Merch. Bank*, 62 Neb. 472; *State v. First Nat. Bank*, 3 S. Dak. 52; *Bullard v. Randall*, 1 Gray (Mass.) 605; *Jones v. First Nat. Bank*, 3 Neb. (Unof.) 73; *Merchants' Bank v. Rudolf*, 5 Neb. 527; *Sandy River Bank v. Merchants' & Mech. Bank*, 1 Biss. (U. S.) 146. See also *Bank v. Schuylkill Bank*, 1 Pars. Eq. Cases (Pa.) 180, 229, and Chap. I. §27, note 13. A debtor on a note who claims to have paid money at several times to the president, enough in the aggregate to extinguish the note, must also prove that he paid him at the bank. And this is especially true if one of the payments to him was made elsewhere. *Tulley v. Citizens' State Bank*, 18 Ind. App. 240.

37 "It is true that the general business of an officer of a national bank is to be transacted at its regular place of business. At the same time we know that in the course of business between banks, officers of banks occasionally do give orders and instructions away from the place of business of the bank." *Drummond, J., Burton v. Burley*, 14 Bank. Mag. 723, 2 Nat. Bank Cases, 134.

38 *Merchants' Bank v. State Bank*, 10 Wall. 604.

go to another place to make a settlement with a creditor; perhaps this is the only way of meeting him. Again, suppose he should, while there, agree for the bank to discount a note as part of the settlement, or indeed for another person in an entirely different transaction, which should be promptly reported on his return, would not his action bind the bank? Beyond question it would, if ratified; and even if it were not, unless tainted with fraud or some suspicious circumstances. He can therefore endorse a note outside the bank,³⁹ certify a check,⁴⁰ make an admission,⁴¹ promise to honor a check,⁴² revive an outlawed debt,⁴³ but cannot receive deposits;⁴⁴ and if he does receive them, the depositor must run the risk of their delivery to the bank.⁴⁵

14. Contracts Between Officers and Their Banks.

Many of the gravest questions touching the authority of a bank officer spring from transactions in which he has a personal interest.⁴⁶ An officer, president, cashier, director, cannot act both for the bank and for himself.⁴⁷ In many cases a contract is made between the directory of a bank and one of their number, or with the president or some other officer, as if for the time being he was an outsider. Thus there is no law to forbid a bank from buying a note of the president or other officer.⁴⁸ If the bank is properly represented, so that its in-

39 *Bissell v. First Nat. Bank*, 69 Pa. 415.

40 *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604.

41 *Houghton v. First Nat. Bank*, 26 Wis. 663.

Contra.—*Kennedy v. Otoe Co. Nat. Bank*, 7 Neb. 59; *Merchants' Bank v. Rudolf*, 5 Neb. 527, 539.

42 *Valdetero v. Citizens' Bank*, 51 La. Ann. 1651.

43 *Morgan & Co. v. Merchants' Nat. Bank*, 13 Lea (Tenn.) 234, 246.

44 *Demarest v. Holdeman*, 34 Ind. App. 685.

Contra.—*Pendleton v. Bank*, 13 B. Mon. (Ky.) 171, 181.

45 *Ibid.*

46 See Chap. XII. Personal and Double Agency Transactions.

47 See Chaps. XII and VIII. §14.

48 "We have never known it questioned that a director or stockholder may trade with, borrow from or loan money to the company of which he is a member on the same terms and in like manner as other persons." *Walker, Ch. J., Harts v. Brown*, 77 Ill. 226, 230; *Merrick v. Peru Coal Co.*,

terests are adequately conserved, it may, under such conditions, lend money or make other contracts with its own officers. They are not, however, beyond the pale of investigation, their contracts are never absolute, and if, on proper inquiry, are found to be one-sided and against the bank, may be set aside or otherwise corrected.⁴⁹

61 Ill. 472, 479; *Beach v. Miller*, 130 Ill. 162; *Blair v. First Nat. Bank*, 2 Flippin (U. S.) 111. A bank is not charged with notice of a fraudulent purpose in negotiating a loan, because the borrower is a director. *Southern Com. Sav. Bank v. Slattery*, 166 Mo. 620; *Johnston v. Shortridge*, 93 Mo. 227; *Benton v. German-Am. Nat. Bank*, 122 Mo. 332. In Iowa a bank may lend to an officer on the same security as is required of other persons, but the loan can be made only by the board in the non-presence of the applicant. Acts of Fifteenth Gen. Assembly, Sec. 17. Chap. 60. *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737. The president of a bank who is a borrower and pledges collateral security cannot, by virtue of his office, sell the collateral without notice. *Appeal of Conyngham*, 57 Pa. 474. "A director may do business with a bank, and may borrow money or discount notes, so long as he does not act for the bank as well as himself, and his relation to the bank may not be different from any other patron." *Hicks v. Steel*, 126 Mich. 408; *St. Johns Nat. Bank v. Steel*, 135 Mich. 165. See *Smith v. Skeary*, 47 Conn. 47.

49 "General authority [in the president and cashier] to make discounts would not authorize them to bind the bank by discounting their own notes." *Gilfillan*, Ch. J., *Rhodes v. Webb*, 24 Minn. 292, 294. In Illinois it is declared that the president has authority to transfer to himself by his own endorsement a note belonging to the bank. *Palmer v. Nassau Bank*, 78 Ill. 380. A cashier cannot issue a draft or check on his bank in payment of his individual debt, and it is not bound thereby. *Gale v. Chase Nat. Bank*, 104 Fed. 214; *Dowd v. Stephenson*, 105 N. C. 467. A manager is not disqualified from purchasing for his own benefit property pledged for a debt. His duty to the bank is discharged if the price paid is sufficient to reimburse the bank so that nothing is lost. *Smith v. Lansing*, 22 N. Y. 520. In one of the latest carefully considered cases *Sanborn*, Cir. J., said: "Contracts and transactions between individuals and corporations of which they are directors or officers, which are fair, which are made in good faith, which do not secure to the individuals any undue or unjust benefit or advantage, and in which the interest of the individuals and the duty of the officials work in unison for the welfare of the corporation, are valid and enforceable both at law and equity. But contracts and transactions between individuals and corporations of which they are directors or officers, which are unfair, in which the individuals have secured an undue or unjust advantage, in which an antagonism between the interest of the individuals and the duty of the officials has resulted in the triumph of

The other class of transactions, in which he assumes to act for the bank as well as himself, the law regards with grave suspicion. He may be, and doubtless is, honest generally when thus acting, but the law cannot in any case regard them as binding on the bank until they have come to the knowledge and been approved, in legal ways, by the directors.⁵⁰

There is another class of transactions in which an officer appears as if he were acting for himself when, in truth, he is acting solely for his bank. The peculiar situation of the property or the interests of parties therein may render individual action by the president more effective than official action. In these cases manifestly a different rule applies, and when the truth clearly appears that his bank received the benefit it is responsible for his action.⁵¹

15. Legality of Contract Containing Legal and Illegal Parts.

An officer who makes a contract with legal and illegal parts, that can be easily separated, renders his bank responsible for the legal part. This is simply another application of an ancient principle pertaining to the law of consideration. Thus an officer may lend money and take illegal security. Whether the transaction be regarded as a single or double contract, the loan may be easily separated from the security. Accordingly, the money loaned may be recovered while the security will not be recognized. Again, a bank may agree to accept a deposit, which is legal, and pay interest thereon, or invest it contrary to law, yet the bank must return the money.⁵² And if an officer, after receiving the money from a depositor, puts it into his own pocket, instead of putting into the general fund of the bank, it is none the less responsible. Recovery may be

the former, are voidable at the option of the corporation, its creditors or stockholders." *Wyman v. Bowman*, 62 C. C. A. 189, citing many cases.

⁵⁰ *Lee v. Smith*, 84 Mo. 304, 309; *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557; *Clafin v. Farmers & Citizens' Bank*, 25 N. Y. 293, 295; *Mercantile Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408, 410.

⁵¹ *Brown v. Mechanics & Traders' Nat. Bank*, 12 N. Y. Supp. 861; *Moore v. Munn*, 69 Ill. 591.

⁵² *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137.

put on a still broader ground: In one case the receiving bank is in duty bound to repay the money; in the other, a similar duty governs the borrower from which he cannot, at his own pleasure, escape.

16. Authority of Savings Bank President.

In savings banks the president is the manager generally of banks located in the larger cities; in other places, the treasurer. Their authority is determined in the same manner as in other cases by statute, by-law, common law, and usage. Their tenure of office may be, and often is, for a longer period than a year, though the law requires the annual election of the trustees, who choose the treasurer or president.⁵³

In some states the law jealously and wisely guards savings banks from falling within the influence or sphere of other banking institutions. To this end their directors and officers are forbidden to serve in savings banks. Consequently the director of a bank of discount who has been elected trustee of a savings bank and accepted the office, has resigned, so the law presumes, as director of the other institution.⁵⁴ The presumption, however, must yield to the fact which may be shown by appropriate evidence. The inhibition hardly applies to the director of a bank that has become insolvent.⁵⁵

17. Exercising Authority After Resigning.

The resignation of an officer takes effect on the delivery of his written resignation to the board and before its acceptance by the directors.⁵⁶ But an officer may bind his bank by an exercise of authority after resigning. This happens when he continues to act as if he were still an officer, and the other party never knew, or was negligent in not knowing, that he had resigned.⁵⁷

53 *Commonwealth v. Reading Sav. Bank*, 129 Mass. 73.

54 *People v. Conklin*, 7 Hun (N. Y.) 188.

55 *Ibid.* But see *Bank of Bethel v. Pahquioque Bank*, 14 Wall. (U. S.) 383; *Sanborn v. Lefferts*, 58 N. Y. 179.

56 *International Bank v. Faber*, 86 Fed. 443, 445, and cases cited.

57 *Patten v. Moses*, 49 Me. 255.

18. Declarations or Information.

(a.) A declaration or information given by officers usually is not binding. This is true especially of all those inquiries that are made about notes and investments and the business standing of a bank's customers;⁵⁸ or that relate to past transactions;⁵⁹ or that are made incidentally when not transacting the business of the bank.⁶⁰ Indeed, their authority to make them has been strongly denied.⁶¹ They can be held liable personally for making deceitful statements that bring in-

58 *Fifth Nat. Bank v. Pierce*, 117 Mich. 376; *First Nat. Bank v. Marshall & Ilsley Bank*, 108 Mich. 114 and cases cited; *Potts v. Chapin*, 133 Mass. 276; *Taylor v. Commercial Bank*, 174 N. Y. 181; *Horrigan v. First Nat. Bank*, 9 Bax. (Tenn.) 137. See Chaps. IX. §44, and IV. §27. A customer who advised with a cashier about investments was offered by letter an "A No. 1" bond. Failing to get that bond for him he offered him another just as good. The bond was purchased, but proved to be insecure. His opinion was shown to be honest, the bank also invested in them; and the purchaser failed to maintain his action. *Lovelace v. Suter*, 93 Mo. App. 429. An endorsement on a note at the maker's request by a bank cashier to whom it had been sent for collection by another bank, in these words, "Never signed a note, fraud, forgery," is a privileged and confidential communication, and it is not actionable. The endorsement is, in truth, the reason for not paying the note, and comes within the general rule "that a communication made in good faith upon any subject in which the person has an interest, or with reference to which he has a duty, public or private, either legal, moral or social, if made to a person having a corresponding interest or duty, is privileged." *Caldwell v. Story*, 107 Ky. 10, 13.

59 *Franklin Bank v. Steward*, 37 Me. 519, containing an able discussion of the subject. The president of a bank, after procuring an acceptance, made declarations concerning it. These were declared not admissible as his power to bind the bank had then ceased. *First Nat. Bank v. Booth*, 102 Iowa 333.

60 *Lee v. Marion Sav. Bank*, 108 Iowa 716; *Sioux Valley State Bank v. Kellogg*, 81 Iowa 124; *Kearney Bank v. Froman*, 129 Mo. 427; *Mercantants' Nat. Bank v. Lovitt*, 114 Mo. 519; *Benton v. German-Am. Bank*, 122 Mo. 332, 339.

61 *Taylor v. Commercial Bank*, 174 N. Y. 181. The judges were divided, four in favor and three against the rule. *American Nat. Bank v. Hammond*, 25 Colo. 367; *Mapes v. Second Nat. Bank*, 80 Pa. 163; *Horrigan v. First Nat. Bank*, 9 Bax. (Tenn.) 137; *Crawford v. Boston Mercantile Co.*, 67 Mo. App. 39; *American Surety Co. v. Pauly*, 170 U. S. 133; *First Nat. Bank v. Marshall & Ilsley Bank*, 28 C. C. A. 42; *Swift v. Jewsbury*, L. R. 9 Q. B. (Eng.) 301.

jury to the persons that act on them,⁶² and also their bank whenever it has received some benefit from their officers' conduct.⁶³ Besides these statements, may be included those intensely personal remarks or outbursts which are clearly intended to be personal and not representative.⁶⁴

The field of liability, therefore, for the declarations of bank officers is very narrow. It is true that some authorities take a sterner view of a bank's responsibility for them.⁶⁵ Yet the only cases of clear liability, apart from those in which the bank in some way has been the gainer, are those wherein the declarations pertained directly to the business of the bank and were designed to influence the conduct of the questioner,⁶⁶ and were within the scope of the authority of the officer who made them.⁶⁷

62 Ibid. Especially concerning the worth of the stock of their bank. *Ward v. Trimble*, 19 Ky. L. Rep. 1801; *Trimble v. Reid*, 19 Ky. L. Rep. 604. A managing officer is liable to his own bank for misrepresentations, for example, those made concerning the worth of parties to a note discounted by the bank. *St. Johns Nat. Bank v. Steel*, 135 Mich. 165. When commendatory laudations concerning the worth of stock "do not amount to knowingly misstating some fact not patent to the observer, or to the concealment of some latent infirmity, at the same time inducing the buyer to believe that it does not exist, such action does not make the seller liable for deceit. It is a well-settled rule that mere commendation, or even false representation, by the seller of property as to its value when the purchaser has an opportunity to ascertain for himself such value by ordinary vigilance or inquiry, has no legal effect on legal rights of the contracting parties, even when made with the intention to deceive." *German Nat. Bank v. Nagel*, 82 S. W. (Ky.) 433. See Chap. VI. §§6, 7.

63 Cases in §44, note 6.

64 See §41.

65 *Hindman v. First Nat. Bank*, 39 C. C. A. 1.

66 For example, a representation by an officer of a bank concerning the solvency of the parent bank. *Hollingsworth v. Howard*, 113 Ga. 1099. See *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. (Eng.) 259; *Swift v. Jewsbury*, L. R. 9 Q. B. (Eng.) 301.

67 "Representations made by an officer or agent of a corporation will not create liability upon the corporation unless the representation be made concerning a business which the corporation is empowered by its charter to do, and the agent must at the time be acting within the scope of its authority." *Commercial Nat. Bank v. First Nat. Bank*, 80 S. W. (Tex.) 601. To procure a signature to a note for another bank and represent it as

A different rule applies to a bank partnership; for no question of authority arises to complicate the inquiry. Consequently, if the answer results in direct injury to the inquirer the partnership is liable.⁶⁸

(b.) Perhaps another limitation ought to be made in those cases wherein the inquirer well knows that the officer in his answer has clearly transcended his authority. Thus a statute forbade the transfer of a debtor's stock without the authority of the directors. A bank cashier replied to an inquirer who desired to take some of the stock as collateral if the bank had no lien thereon, "I do not hold any lien on said stock." In truth, the owner was indebted to the bank. A majority of the court held that the bank was estopped by the cashier's answer.⁶⁹ If the inquirer interpreted this answer to mean that the debtor was not in fact indebted to the bank, he was justified in taking the stock; but if he knew that the owner was a debtor, the statute was just as clear knowledge of the cashier's authority as to the cashier himself. From the record of the case the inquirer was probably justified in not regarding the owner as a debtor; and the consequence of the cashier's mistake was therefore rightfully regarded by the court as falling on the bank.

(c.) Again, the knowledge of an officer's wrongful act, performed outside the scope of his authority and especially for his own personal end, is not imputed to the bank, "for the sole reason that he is an employe."⁷⁰ Although an officer may deal with his bank, yet it could not safely permit him to do so if the rule were not rigidly observed that it was not chargeable with

genuine are not acts within the national banking laws, and do not bind the bank. *Ibid.* In this case the court said: "The act of [the officer] who signed the statement as president of the First Nat. Bank, was a mere personal transaction of his own, and if any liability was created thereby it rested upon him individually, and not upon the bank."

68 *James v. Crosthwait*, 97 Ga. 673.

69 *Oakland Co. Sav. Bank v. State Bank*, 113 Mich. 284.

70 See Chap. XI. *National Bank v. Carper*, 67 S. W. (Tex. Civ. App.) 188; *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737; *State v. Miller*, 85 Pac. (Or.) 81.

his uncommunicated knowledge of the matter which is the subject of the transaction.⁷¹

19. Specific Exercise of Authority, Selection and Oversight of Subordinates.

From the general exercise of authority by the managers as distinguished from the directory, we pass to specific exercises. What can, and must they do, by virtue of their station? A very important duty is to exercise proper skill in the selection of their subordinates and in supervising their work. Of course, the law does not require a cashier to act the part of bank examiner or inspector; if he did, there would be no time left for fulfilling his more general duties. Nevertheless, a cashier must supervise the work of his subordinates "and keep an oversight over the books." And if he should incapacitate himself by drunkenness or any other voluntary act from exercising such supervision, he would be responsible for the consequences resulting from the unfaithful and negligent work of a subordinate.⁷²

20. Loans.

A duty hardly less important is to lend by the ordinary modes the bank's money.⁷³ In some states directors still exercise this authority and cannot delegate it, either to a finance committee, or to the president, cashier or any other officer.⁷⁴

⁷¹ Merchants' Nat. Bank v. Lovitt, 114 Mo. 519, 525; Frenkel v. Hudson, 82 Ala. 158; Wickersham v. Chicago Zinc Co., 18 Kan. 481; Barnes v. Trenton Gas Light Co., 27 N. J. Eq. 33; Innerarity v. Merchants' Nat. Bank, 139 Mass. 332; First Nat. Bank v. Babbidge, 160 Mass. 563; First Nat. Bank v. Christopher, 40 N. J. Law. 435; Benton v. German Am. Bank, 122 Mo. 332, 339; Johnston v. Shortridge, 93 Mo. 227; School District v. DeWeese, 100 Fed. 705; Jones v. First Nat. Bank, 3 Neb. (Unof.) 73; German Sav. Bank v. Des Moines Nat. Bank, 122 Iowa 737; First Nat. Bank v. Gifford, 47 Iowa 575, 582.

⁷² Grant Co. Deposit Bank v. Points, 56 S. W. (Ky.) 662; Batchelor v. Planters' Nat. Bank, 78 Ky. 435, 446.

⁷³ See Chap. VII. §1.

⁷⁴ When by-laws forbid loans to be made without the approval of the finance committee, the president or cashier cannot lend on his own judgment. Oakland Bank v. Wilcox, 60 Cal. 126. See Chap. VIII. §27d 1.

In most of them the rule is otherwise, and the older rule is no longer followed.⁷⁵ But wherever the most general authority to lend is given to the president, cashier or other manager, he cannot lend to himself.⁷⁶ Nor can he profit directly by lending to others; and, if attempting, would be liable to the bank for the loss thereby incurred.⁷⁷ In executing this authority he can take collateral security,⁷⁸ and sell the same.⁷⁹

21. Collection of Debts.

He can exercise a large measure of authority to secure or collect a debt. The law clearly comprehends the need of exercising such authority in order to preserve the solvency and usefulness of the bank. Accordingly he can sue and attach

75 *Bell v. Hanover Nat. Bank*, 57 Fed. 821; *Fisher v. Continental Nat. Bank*, 26 U. S. App. 382; *Coats v. Donnell*, 94 N. Y. 168; *Second Nat. Bank v. Burt*, 93 N. Y. 233; *German Nat. Bank v. Grinstead*, 21 Ky. L. Rep. 674; *Western Bank v. Coldeway*, 83 S. W. (Ky.) 629; *Berton v. Central Bank*, 5 Allen (N. Bruns.) 493; *Roe v. Bank of Versailles*, 167 Mo. 406. See *Mining Co. v. Californian Bank*, 104 U. S. 192; *Kitchens v. Teasdale Commission Co.*, 79 S. W. (Mo. App.) 1177. A purchase is only another form of loan and is within his authority. *Brown v. National State Bank*, 3 U. S. App. 7, containing many authorities. See *Shinkle v. First Nat. Bank*, 22 Ohio St. 516, 524.

76 *Wallace v. Lincoln Sav. Bank*, 89 Tenn., 630. See Chap. XII. §7. But a cashier can borrow with the consent of the directors, and if he should invest the money in land no trust would arise therein in favor of the bank. *Barth v. Koetting*, 99 Wis. 242.

77 *Oakland Bank v. Wilcox*, 60 Cal. 126.

78 *Bell v. Hanover Nat. Bank*, 57 Fed. 821; *Coats v. Donnell*, 94 N. Y. 168; *Wales v. Bank of Michigan*, Har. Ch. (Mich.) 308. A cashier has power to accept in lieu of a bond given to secure discounts another bond for a larger amount, and to surrender the other, thereby releasing the sureties. *German-Am. Bank v. Schwinger*, 75 N. Y. App. Div. 393. A cashier who, in the president's absence, is running the bank under the advice of the executive committee, can renew notes in consideration of the release by the endorser of a lien on the maker's property. *Bank v. Bright*, 23 C. C. A. 586.

79 *Sistare v. Best*, 16 Hun (N. Y.) 611. A cashier took the acknowledgment of a mortgage of a debtor to the bank. The fact that the cashier was interested in the proceeds did not invalidate his act. As between the parties the mortgage was valid and enforceable. *Bardsley v. German-American Bank*, 113 Iowa 216.

property;⁸⁰ and to that end can employ counsel;⁸¹ assign and foreclose a mortgage;⁸² compromise a debt;⁸³ remit a judgment in the bank's favor for a sufficient consideration;⁸⁴ release after payment obligations given to secure a debt;⁸⁵ extend or renew a debt and take a new obligation and security therefor;⁸⁶ give notice of the presentment of a note for payment and refusal to the endorsers;⁸⁷ and, of course, receive payments that are made in the ordinary transaction of business.⁸⁸ Lastly, he may make collections and, if need be, bring suits for that purpose.⁸⁹

80 *National Park Bank v. Whitmore*, 40 Hun (N. Y.) 499. See Chap. VII. §18.

81 *Mumford v. Hawkins*, 5 Denio (N. Y.) 355, 358; *Am. Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496; *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9; *Root v. Olcott*, 42 Hun (N. Y.) 536; *Savings Bank v. Benton*, 2 Met. (Ky.) 240, 244; *Case v. Hawkins*, 53 Miss. 702; *Young v. Hudson*, 99 Mo. 102; *Southgate v. Atlantic & Pacific R.*, 61 Mo. 89; *Western Bank v. Gilstrap*, 45 Mo. 419; *Eastman v. Coos Bank*, 1 N. H. 23; *Merchants' Nat. Bank v. Eustis*, 8 Texas Civ. App. 350; *First Nat. Bank v. Kimberlands*, 16 W. Va. 555, 579; *Hodge v. First Nat. Bank*, 22 Gratt. (Va.) 51, 79.

82 *Belden v. Meeker*, 47 N. Y. 307; *Valk v. Crandall*, 1 Sand. Ch. (N. Y.) 179.

83 *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189, revg. 8 Daly 530; *Bank v. Warren*, 7 Hill (N. Y.) 91; *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9; *Corser v. Paul*, 41 N. H. 24; *Eastman v. Coos Bank*, 1 N. H. 23; *Cake v. Pottsville Bank*, 116 Pa. 264; *United States v. City Bank*, 21 How. (U. S.) 356; *Belleville Sav. Bank v. Winslow*, 35 Fed. 471. Formerly he could not compromise a debt. *Wheat v. Bank of Louisville*, 9 Ky. L. Rep. 738; *Bank v. Hooke*, 1 Cold. (Tenn.) 156; *Sandy River Bank v. Merchants' & Mech. Bank*, 1 Biss. (Fed.) 146. See §28.

84 *Case v. Hawkins*, 53 Miss. 702. When he can release a judgment lien. See *Winton v. Little*, 94 Pa. 64.

85 *Matthews v. Mass. Nat. Bank*, 1 Holmes 396; *Ryan v. Dunlap*, 17 Ill. 40, 43. Including mortgages, *Ryan v. Dunlap*, 17 Ill. 40; *Sawyer v. Cox*, 63 Ill. 130; *Wood v. Whelan*, 93 Ill. 153; *Smith v. Smith*, 62 Ill. 493; *Belleville Sav. Bank v. Winslow*, 35 Fed. 471.

86 *Wakefield Bank v. Truesdell*, 55 Barb. (N. Y.) 602.

87 *Bank v. Vaughan*, 36 Mo. 90.

88 *Young v. Hudson*, 99 Mo. 102; *Reno v. James*, 16 Ky. L. Rep. 60; *Parker v. Donnally*, 4 W. Va. 648; *Booth v. Farmers' & Mech. Nat. Bank*, 4 Lans. (N. Y.) 301, 305.

89 *Hanson v. Heard*, 69 N. H. 190; *Haynes v. Succession of Beckman*, 6 La. Ann. 224; *Watson v. Bennett*, 12 Barb. (N. Y.) 196; *Bank v. Reed*,

22. Transfer of Paper.

He can endorse and transfer the bank's paper, and to that end can guarantee the same.⁹⁰ In the earlier days his authority to do this was questioned unless he had been authorized by the directors;⁹¹ now, no exercise of authority by him is more general or better sustained by usage and judicial sanction. But when he is prohibited by a by-law, known to the transferee, the transfer is void.⁹²

More specifically defined, he may endorse and transfer the paper owned, or received by the bank for collection;⁹³ for the purpose of making a demand and instituting a suit;⁹⁴ or

1 Watts & S. (Pa.) 101; Warren v. Gilman, 17 Me. 360; Potter v. Merchants' Bank, 28 N. Y. 641. See Chap. XVIII. §20. Though a bank has no interest in a note left for collection, yet for the purpose of receiving and transmitting notices is the real holder, and this can be done by the president, cashier or other managing officer. Burnham v. Webster, 19 Me. 232; Warren v. Gilman, 17 Me. 360; Freeman's Bank v. Perkins, 18 Me. 292.

90 Chap VII. §20. U. S. Nat. Bank v. First Nat. Bank, 24 C. C. A. 597, 599; West St. Louis Bank v. Shawnee Co. Bank, 95 U. S. 557; United States v. City Bank, 21 How. (U. S.) 356; Fleckner v. Bank, 8 Wheat. (U. S.) 338; Mechanics' Bank v. Bank, 5 Wheat. 326; State Bank v. Fox, 3 Blatch. (U. S.) 431; Blair v. First Nat. Bank, 2 Flippin (U. S.) 111; People's Bank v. National Bank, 101 U. S. 181; Palmer v. Nassau Bank, 78 Ill. 380; Allison v. Hubbell, 17 Ind. 559; Northampton Bank v. Pepoon, 11 Mass. 288; Folger v. Chase, 18 Pick. (Mass.) 63; City Nat. Bank v. Thomas, 46 Neb. 861; Howland v. Meyer, 3 N. Y. 290; Potter v. Merchants' Bank, 28 N. Y. 641; Watervliet Bank v. White, 1 Denio (N. Y.) 608; Brockway v. Allen, 17 Wend. (N. Y.) 40; Babcock v. Beman, 11 N. Y. 200; Reznor v. Hatch, 2 Handy (Ohio) 42; Smith v. Lawson, 18 W. Va. 212; Auten v. Manistee Nat. Bank, 67 Ark. 243; Cooper v. Curtis, 30 Me. 488; Preston v. Cutter, 64 N. H. 61; City Bank v. Perkins, 29 N. Y. 554; Bissell v. First Nat. Bank, 69 Pa. 415; Arnold v. Swenson, 44 S. W. (Tex. Civ. App.) 870; Bank of Oregon, Re Assignment, 32 Or. 84; Merchants' Bank v. Central Bank, 1 Kelly (Ga.) 418; Holt v. Bacon, 25 Miss. 567; Farrar v. Gilman, 19 Me. 440.

91 Thomas v. City Nat. Bank, 40 Neb. 501. See Peninsular Bank v. Hammer, 14 Mich. 208, 215.

92 Bank of Oregon, Re Assignment, 32 Or. 84.

93 Robb v. Ross Co. Bank, 41 Barb. 586; Elliot v. Abbot, 12 N. H. 549; Corser v. Paul, 41 N. H. 24.

94 Hartford Bank v. Barry, 17 Mass. 94.

for the purpose of pledging or selling it.⁹⁵ His authority, however, to deal as freely with non-negotiable paper was once withheld,⁹⁶ but this limitation may now be questioned.

23. Borrowing.

He can also borrow for his bank;⁹⁷ and pledge its securities for payment.⁹⁸ This has sometimes been regarded as a larger exercise of authority than that of lending his bank's resources.⁹⁹ Accordingly it has been held that while he had authority to lend without specific authority from the directors,

95 *Wild v. Bank*, 3 *Mason* (U. S.) 505; *Lafayette Bank v. State Bank*, 4 *McLean* (U. S.) 208; *Kimball v. Cleveland*, 4 *Mich.* 606; *Harper v. Calhoun*, 7 *How.* (Miss.) 203; *Crockett v. Young*, 1 *Sm. & M.*, (Miss.) 241; *Everett v. United States*, 6 *Port. (Ala.)* 584; *Maxwell v. Planters' Bank*, 10 *Humph. (Tenn.)* 507; *Bank v. Wheeler*, 21 *Ind.* 90; *Sturges v. Bank*, 11 *Ohio St.* 153; *Fleckner v. Bank*, 8 *Wheat. (U. S.)* 338. See *United States v. Greene*, 4 *Mason* (U. S.) 427.

Contra.—*Elliot v. Abbott*, 12 *N. H.* 549.

96 *Barrick v. Austin*, 21 *Barb. (N. Y.)* 241 (1855); *Holt v. Bacon*, 25 *Miss.* 567 (1853); *Elliot v. Abbot*, 12 *N. H.* 549 (1842).

97 *Chap VII. §22. Trust Co. v. Cook Co. Nat. Bank*, 15 *Fed.* 885; *Merchants' Bank v. State Bank*, 10 *Wall. (U. S.)* 604; *Creswell v. Lananhan*, 101 *U. S.* 347, 351; *Lafayette Bank v. State Bank*, 4 *McLean* (U. S.) 208; *Wild v. Bank*, 3 *Mason* (U. S.) 505; *Jackson v. Brown*, 5 *Wend. (N. Y.)* 590; *Barnes v. Ontario Bank*, 19 *N. Y.* 152; *City Bank v. Perkins*, 29 *N. Y.* 554; *Leavitt v. Blatchford*, 17 *N. Y.* 521; *Robb v. Ross Co. Bank*, 41 *Barb. (N. Y.)* 586; *Coats v. Donnell*, 94 *N. Y.* 168, 176; *Donnell v. Lewis Co. Sav. Bank*, 80 *Mo.* 165; *Mercantile Bank v. McCarthy*, 7 *Mo. App.* 318; *Ringling v. Kohn*, 6 *Mo. App.* 333; *Continental Nat. Bank v. Farris*, 77 *Mo. App.* 186; *Dowd v. Stephenson*, 105 *N. C.* 467; *Bank v. Wheeler*, 21 *Ind.* 90; *Ward v. Johnson*, 95 *Ill.* 215; *Kimball v. Cleveland*, 4 *Mich.* 606; *Ballston Spa Bank v. Marine Bank*, 16 *Wis.* 120; *Rockwell v. Elkhorn Bank*, 13 *Wis.* 653; *Lowe v. Ring*, 115 *Wis.* 575, 580; *Houghton v. First Nat. Bank*, 26 *Wis.* 663; *Winterfield v. Cream City B. Co.*, 96 *Wis.* 239; *First Nat. Bank v. Arnold*, 156 *Ind.* 487; *Magee v. Mokelumnee Mining Co.*, 5 *Cal.* 258; *Leggett v. N. J. Manufg. & Bkg. Co.*, 1 *N. J. Eq.* 541; *Bank of Australasia v. Breillat*, 6 *Moore, P. C. (Eng.)* 152.

Contra.—*Ridgway v. Farmers' Bank*, 12 *Serg. & R. (Pa.)* 256.

98 *Aldrich v. Chemical Nat. Bank*, 176 *U. S.* 618; *Auten v. U. S. Nat. Bank*, 174 *U. S.* 125; *City Nat. Bank v. Chemical Nat. Bank*, 52 *U. S. App.* 209.

99 *Ibid.*

he could not borrow.¹ But this is no longer the prevailing rule.² His authority to borrow includes re-discounting.³

Again, a bank officer who, in exercising adequate authority, borrows for his bank, renders it liable therefor, though he may have diverted the loan to his own personal use. The lender is not obliged to follow the fund; his right thereto is complete if he has exercised good faith and proper care in making the loan.⁴

24. Receiving Deposits.

He can receive ordinary ⁵ and special deposits of money, even those of a gambler,⁶ bonds, and other securities,⁷ and issue certificates for them,⁸ also special deposits of public money and give security therefor.⁹

25. Reviving Debts and Confessing Judgments.

For a good reason he can revive a debt barred by the statute of limitation,¹⁰ and in some states he can confess a judg-

1 First Nat. Bank v. Michigan City Bank, 8 N. Dak. 608, following Western Nat. Bank v. Armstrong, 152 U. S. 346, affg. 54 U. S. App. 462, and Chemical Nat. Bank v. Armstrong, 13 C. C. A. 47.

2 See cases under 1.

3 Auten v. U. S. Nat. Bank, 174 U. S. 125; U. S. Nat. Bank v. First Nat. Bank, 24 C. C. A. 597; West St. Louis Sav. Bank v. Shawnee Co. Bank, 95 U. S. 557; City Nat. Bank v. Chemical Nat. Bank, 26 C. C. A. 195.

4 Aldrich v. Chemical Nat. Bank, 176 U. S. 618.

5 Wright v. Stewart, 130 Fed. 905.

6 Ibid.

7 National Bank v. Graham, 100 U. S. 699, affg. 79 Pa. 106; Ray v. Bank, 10 Bush (Ky.) 344, 354; Kilgore v. Bulkley, 14 Conn. 362; Allison v. Hubbell, 17 Ind. 559; Jones v. Hawkins, 17 Ind. 550; Hazleton v. Union Bank, 32 Wis. 34. See Hughes v. First Nat. Bank, 110 Pa. 428. A bank manager is not acting within the scope of his authority in accepting the check of a customer to deliver to another customer on a particular day, or on the happening of a particular event. Grieve v. Molsons Bank, 8 Ont. (Can.) 162.

8 White v. Franklin Bank, 22 Pick. (Mass.) 181; Crystal Plate Glass Co. v. First Nat. Bank, 6 Mont. 303.

9 Richards v. Osceola Bank, 79 Iowa 707.

10 Morgan & Co. v. Merchants' Nat. Bank, 13 Lea (Tenn.) 234; Wells v. Enright, 127 Cal. 669. See §30 and State Trust Co. v. Sheldon, 68 Vt. 259; Wood on Limitations, §76.

ment,¹¹ but in the larger number he cannot do this without specific authority.¹² Nor is the trend of cases in favor of enlarging his authority in this regard. In making a judgment-note in the course of business his authority may be presumed without direct action by his board, the law thereby conferring protection on an innocent stranger who may have taken it, but this presumption does not cover or justify further action by him unsupported by prior authority or subsequent approval by his board.¹³

26. Certification.

He can certify checks.¹⁴ By the national law he is forbidden to certify in excess of the maker's deposit,¹⁵ but, unless the inhibition is positive, he may do this under proper circumstances.¹⁶ It is only another kind of loan which, if properly secured, is just as safe and proper as any other.¹⁷

11 *Manley v. Mayer*, 68 Kan. 377; *Chamberlin v. Mammoth Mining Co.*, 20 Mo. 96; but see *Murray v. St. Louis Oil Mfg. Co.*, 33 Mo. 377; *Miller v. Bank*, 2 Or. 291. Though a debtor may confess judgment for a lawful debt, it is a fraud for an insolvent debtor to sign a confession of judgment in favor of a bank, on its agreement to withhold it from record until this becomes necessary to protect itself. *Walton v. First Nat. Bank*, 13 Colo. 265.

12 *Fogg v. Ellis*, 61 Neb. 829; *Nimocks v. Cape Fear Shingle Co.*, 110 N. C. 20; *Stokes v. N. J. Pottery Co.*, 46 N. J. Law 237; *White v. Crow*, 17 Fed. 98; *Stevens v. Carp River Iron Co.*, 57 Mich. 426; *Snyder v. Bailey*, 165 Ill. 447; 1 *Black on Judgments*, §59, p. 83, 2d Ed. A bank may employ an attorney to confess a judgment. *U. S. Electric Lighting Co. v. Leiter*, 19 D. C. 575.

13 *Atwater v. American Ex. Bank*, 152 Ill. 605; *McDonald v. Chisholm*, 131 Ill. 273.

14 See §§29, 30, Chap. XXIII. *Cooke v. State Nat. Bank*, 52 N. Y. 96; *Continental Nat. Bank v. National Bank*, 50 N. Y. 575; *Hill v. Nation Trust Co.*, 108 Pa. 1; *Dorsey v. Abrams*, 85 Pa. 299; *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604.

Contra.—*Mussey v. Eagle Bank*, 9 Met. (Mass.) 306. The secretary of a banking company is not a certifying officer. *Hallowell & Augusta Bank v. Hamlin*, 14 Mass. 178.

15 Rev. Stat. §5208; *Chadwick v. United States*, 141 Fed. 225.

16 See *Potter v. United States*, 155 U. S. 438.

17 And if the bank is secured in making illegal certifications, its title to

Certifying may be regarded from two points of view. As between himself and the bank he must have well defined authority to justify the act. He must be expressly authorized by the directors, or, if assuming this authority, they must subsequently learn of its exercise and ratify his conduct. Doubtless if he continued to do this repetition would ripen into ample authority without formal or express ratification.¹⁸

As between the bank and third parties he can bind the bank for the amount certified, whether exceeding the deposit or not,¹⁹ provided the holder of the check did not know the true state of the depositor's account.²⁰ But if he does know, the bank is not bound. This rule, of course, would not apply whenever the certifying officer in thus overcertifying was acting with the bank's knowledge or approval.²¹

27. Real Estate Transactions.

His authority in real estate transactions may next be considered. His action in securing a doubtful loan is generally upheld.²² In transferring it, as the bank's seal must be used,

the securities is not thereby impaired. *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, affg. 113 N. Y. 325.

18 See Chap. XXIII. §1.

19 *Farmers' & Mech. Bank v. Butchers' & Drov. Bank*, 16 N. Y. 125; *Cooke v. State Nat. Bank*, 52 N. Y. 96, 114-116; *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325, 334, affd. 146 U. S. 240; *National Bank v. Stewart*, 107 U. S. 676. The federal statute requires the certifying officer to ascertain the condition of one's account before certifying his check. Nor can this duty be abrogated by any by-law or division of duties between officers. *Spurr v. United States*, 59 U. S. App. 663.

20 *Farmers' & Mech. Bank v. Butchers' & Drov. Bank*, 16 N. Y. 125; *Clarke Nat. Bank v. Bank*, 52 Barb. (N. Y.) 592. See §11.

21 *Claffin v. Farmers & Citizens' Bank*, 25 N. Y. 293; *Lee v. Smith*, 84 Mo. 304, 309; *Mercantile Mutual Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408, 410; *Rhodes v. Webb*, 24 Minn. 292, 294; *Gale v. Chase Nat. Bank*, 43 C. C. A. 496; see also *Rankin v. Chase Nat. Bank*, 188 U. S. 557, revg. 46 C. C. A. 683; *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557.

22 *Libby v. Union Nat. Bank*, 99 Ill. 622, 630. See Chap. VII, §§14-19. If he take cattle on which there is a prior lien, he must answer to the

he acts *prima facie* by authority of the board.²³ And when he has executed a deed for the bank and affixed the seal this will be regarded as the seal of the bank, therefore the burden of proving that the deed was executed without authority is on the contracting party.²⁴

He can assign a mortgage to another bank to secure a debt;²⁵ or release one after payment of the debt for which it was given as security.²⁶ Lastly, authority to sell and convey the bank's real estate includes authority to make a contract to convey at a future time.²⁷

28. Compromises and Litigation.

Once, it was held that the compromise of a debt was peculiarly within the province of the directory. This rule rested on the idea that a compromise involved the yielding or giving up something, and a president or cashier could not do this. Doubtless, his authority is still restricted in the cases of a president or other officer whose relations with his bank are slight and occasional.²⁸ But the authority of managers, to whom the control of their bank is essentially entrusted, to compromise a debt is quite as complete as their authority to create a

lienor' on the sale of them. *Panhandle Nat. Bank v. Emery*, 78 Tex. 498.

23 *Mutual Life Ins. Co. v. Yates Co. Nat. Bank*, 35 N. Y. App. Div. 218.

24. *Ibid.* In this case it was declared that the presumption of the president's authority to execute the instrument was not overcome by proof that no resolution authorizing its execution was found in the minutes of the board.

25 *Stapylton v. Stockton*, 33 C. C. A. 542.

26 *Ryan v. Dunlap*, 17 Ill. 40; *McCraith v. National Mohawk Valley Bank*, 104 N. Y. 414; *First Nat. Bank, v. Reno*, 73 Iowa, 145; *Cooper v. Hill*, 36 C. C. A. 402, 405.

27 *Augusta Bank v. Hamblet*, 35 Me. 491. But he has no authority to buy and sell real estate like an ordinary agent. *Burris v. Bank*, 70 Mo. App. 675; *Winsor v. Lafayette Co. Bank*, 18 Mo. App. 665. A cashier who has authority to employ a broker to negotiate the sale of lands belonging to the bank binds it for any statement concerning their identity. *Arnold v. National Bank of Naupaca*, 105 N. W. (Wis.) 828.

28 *Wheat v. Bank*, 9 Ky. L. Rep. 738. See §21.

new one.²⁹ Some limitations perhaps remain; of course, they must act in good faith, and accept something tangible in the way of a compromise; they would hardly be justified in taking for a note a verbal assignment of an intangible interest in another note held by another party as collateral security.³⁰

29. Miscellaneous Exercises of Power.

Besides the exercises of power above mentioned, he can pay the debts of the bank incurred in the ordinary transaction of its business and give checks therefor,³¹ or obligations belonging to it, and to that end can endorse the same.³² He can credit the proceeds of checks and drafts to their owners;³³ sign and record certificates of stock issued to holders and transferees;³⁴ and offer a reward.³⁵ In many states also he can sell notes,

29 *Cake v. Pottsville Bank*, 116 Pa. 264; *Belleville Sav. Bank v. Winslow*, 35 Fed. 471; *Farmers' Nat. Bank v. Templeton*, 40 S. W. (Tex. Civ. App.) 412; *First Nat. Bank v. New*, 146 Ind. 411. In *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189, 193, the court said: "It was proved that compromises were matters of common occurrence in plaintiff's bank, and it cannot be presumed that this compromise, made by the cashier after consultation with the president, was made without authority, nor can it be presumed that in ordinary matters of this kind the formal sanction of the board of directors was necessary."

30 *Piedmont Bank v. Wilson*, 124 N. C. 561, 562. The officers and directors of a national bank may become sureties on a bond required of the bank in attachment proceedings. *Laning v. Iron City Nat. Bank*, 36 S. W. (Tex. Civ. App.) 481. See Chap. VII. §25, note 7.

31 *Valdetero v. Citizens' Bank*, 51 La. Ann. 1651; *Neiffer v. Bank*, 1 Head (Tenn.) 162.

32 *Everett v. United States*, 6 Porter (Ala.) 166; *Kimball v. Cleveland*, 4 Mich. 606; *Wild v. Bank*, 3 Mason (U. S.) 505.

33 *German Nat. Bank v. Grinstead*, 21 Ky. L. Rep. 674.

34 *National Bank v. Watsontown Bank*, 105 U. S. 217; *Case v. Bank*, 100 U. S. 446. A bank president signs certificates of stock in blank and leaves them with the cashier, though all the stock has been issued. He fraudulently issues a certificate to himself and pledges it as collateral for a loan. The bank is liable for the value of the stock to the pledgee, although the certificate recites that it is transferable only on the stock book of the bank. *Havens v. Bank of Tarboro*, 132 N. C. 214, citing many cases.

35 *Bank of Minneapolis v. Griffin*, 168 Ill. 314. See *Kelsey v. National Bank*, 69 Pa. 426. If a bank offers a reward for the arrest and conviction of a person and interpleads for the purpose of determining to what claim-

drafts and other securities;³⁶ and the cashier of a private banking house has similar authority;³⁷ but as a national bank, is restricted in its dealings to national securities, of course the power of its officers is similarly limited in this regard.³⁸

30. Limitations on Officers' Powers.

The limitations on his powers are harder to define because his authority is expanding.³⁹ Authority to do many of the things just described were once denied. Of course, he is bounded as rigidly as ever by statute, and consequently cannot charge more than the legal rate of interest;⁴⁰ nor overcertify by the federal law a check;⁴¹ nor receive a deposit when his bank is insolvent;⁴² in short, can do nothing contrary to positive law.

By common law and usage he cannot perhaps compensate a promoter who has aided in securing subscriptions for the stock of his bank;⁴³ and is especially forbidden from releasing a

ant the money shall be paid, the costs of the proceeding cannot be deducted from the reward. *Kinn v. First Nat. Bank*, 118 Wis. 537.

36 *Coats v. Donnell*, 94 N. Y. 168, 176; *Mercantile Bank v. McCarthy*, 7 Mo. App. 318, 324; *Carey v. Giles*, 10 Ga. 9; *Union Nat. Bank v. First Nat. Bank*, 45 Ohio St. 236; *Sturges v. Bank*, 11 Ohio St. 153.

Contra.—*State v. Davis*, 50 How. Pr. 447.

37 *Crain v. First Nat. Bank*, 114 Ill. 516. In Missouri, by act of 1895, p. 20, no bank cashier has power to sell or hypothecate any notes of the bank until it is conferred by a board of directors. *Vansandt v. Hobbs*, 84 Mo. App. 628. The profit from negotiating bonds by the cashier while discharging his duties belongs to the bank. *Mt. Vernon Bank v. Porter*, 148 Mo. 176.

38 See Chap. I. §25.

39 See Chap. VIII. §19.

40 Rev. Stat. of U. S. §§ 5197, 5198.

41 Rev. Stat. §5208. See *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240.

42 See Chap. VI. §6.

43 *Tift v. Quaker City Nat. Bank*, 141 Pa. 550, affg. 8 Pa. Co. Ct. 606. Nor would the reaping of some advantage by a bank from an unauthorized contract by its president with a promoter render it liable. *Ibid.* He cannot execute a bill of sale of the bank's property for a debt. *Asher v. Sutton*, 31 Kan. 286.

debtor.⁴⁴ In this regard the law is as imperative as ever and consequently he cannot, without receiving an equivalent, release the maker, endorser or guarantor of any obligation,⁴⁵ or release or give up any kind of property, whereby the bank's interest would be sacrificed.⁴⁶ Nor can he subject his bank to any additional liability by an accommodation guaranty or endorsement,⁴⁷ or other obligation for which the bank is to receive nothing, or by promising to pay any kind of an invalid debt.⁴⁸

44 *Hodge v. First Nat. Bank*, 22 Gratt. (Va.) 51; *Bank v. Dunn*, 6 Pet. (U. S.) 51; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 122; *Daviess Co. Sav. Assn. v. Sailor*, 63 Mo. 24, 27; *Martin v. Webb*, 110 U. S. 7, 14; *Lawrence v. Stearns*, 79 Fed. 878.

45 *Gray v. Farmers' Nat. Bank*, 81 Md. 631; *Ecker v. First Nat. Bank*, 59 Md. 303; *Payne v. Commercial Bank*, 6 Sm. & M. (Miss.) 24; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 122; *Merchants' Bank v. Rudolf*, 5 Neb. 527, 536; *Bank v. Dunn*, 6 Pet. (U. S.) 51; *Barrington v. Bank*, 14 Serg. & R. (Pa.) 405; *Thompson v. McKee*, 5 Dak. 172, 178; *Bank v. Jones*, 8 Dak. 12; *Bank v. Tisdale*, 84 N. Y. 655; *Wyman v. Hallowell & Augusta Bank*, 14 Mass. 58; *Davis v. Randall*, 115 Mass. 547; *Mills Co. Nat. Bank v. Perry*, 72 Iowa, 15; *Wing v. Commercial & Sav. Bank*, 103 Mich. 565; *Daviess Co. Sav. Assn. v. Sailor*, 63 Mo. 24; *People's Sav. Bank v. Hughes*, 62 Mo. App. 576. While an officer cannot release a surety without payment, the power to do so may be conferred by the directors and "may be inferred from evidence of a general course of dealing, or from proof that the officer or agent had been intrusted with the entire management of the business of the bank." *Pierce City Nat. Bank v. Hughlett*, 94 Mo. App. 268, 272; *Savings Bank v. Hughes*, 62 Mo. App. 576; *Washington Bank v. Butchers' & Drov. Bank*, 107 Mo. 133.

46 A cashier has no authority to accept a worthless check on another bank and charge the amount to his own bank. This is a fraud. *Van Buren Co. Sav. Bank v. Stirling Mills Co.*, 125 Iowa 645, 649; *Clarke Nat. Bank v. Bank of Albion*, 52 Barb. (N. Y.) 592; *Farmers' & Mech. Bank v. Butcher & Drov. Bank*, 16 N. Y. 125.

47 *Morse v. Mass. Nat. Bank*, 1 Holmes 209; *Commonwealth v. Reading Sav. Bank*, 133 Mass. 16, 21; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116; *Rich v. State Nat. Bank*, 7 Neb. 201, 206; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Merchants' Bank v. Marine Bank*, 3 Gill. (Md.) 96; *Henry v. Northern Bank*, 63 Ala. 527, 537; *Spyker v. Spence*, 8 Ala. 333; *Swofford Brothers Dry Goods Co. v. Bank*, 81 Mo. App. 46. If it accepts the benefits of the guaranty the bank is liable. *Swofford case*, 81 Mo. App. 46.

48 *Blair v. First Nat. Bank*, 2 Flippin (U. S.) 111.

He cannot, without express authority, give a certificate relating to a bank official's conduct. Though given to a surety company in good faith which, acting thereon, signed a bond of indemnity for the official, the bank was not bound.⁴⁹

An officer cannot promise to pay a debt which the bank does not owe,⁵⁰ or to pay any guarantor of an obligation due to his bank,⁵¹ nor can he certify his own checks,⁵² unless authority is clearly conferred,⁵³ nor discharge a debtor of any kind without payment;⁵⁴ nor one of several debtors of an obligation;⁵⁵ nor extend the time for paying a note in advance and thus discharge an endorser;⁵⁶ nor accept the stock of another company instead of money in payment of a debt due to the bank;⁵⁷ nor promise without consideration to the drawer of a draft to pay it out of funds of the drawer, who has been credited with the proceeds of other paper.⁵⁸

49 *Fidelity & Dep. Co. v. Courtney*, 43 C. C. A. 331.

50 *Rich v. State Nat. Bank*, 7 Neb. 201, 206; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Merchants' Bank v. Marine Bank*, 3 Gill (Md.) 96; *Henry v. Northern Bank*, 63 Ala. 527, 537; *Commonwealth v. Reading Sav. Bank*, 133 Mass. 16, 21.

51 *Hodge v. First Nat. Bank*, 22 Gratt. (Va.) 51; *Bank v. Dunn*, 6 Pet. (U. S.) 51; *Gallery v. National Ex. Bank*, 41 Mich. 169; *Stevenson v. Bay City*, 26 Mich. 44.

52 *Claffin v. Farmers & Citizens' Bank*, 25 N. Y. 293; *Rhodes v. Webb*, 24 Minn. 292, 294.

53 *Gale v. Chase Nat. Bank*, 43 C. C. A. 496; second trial, 46 C. C. A. 683, *revd.* 188 U. S. 557.

54 *Union Bank v. Bagley*, 10 Rob. (La.) 43; *Hodge v. First Nat. Bank*, 22 Gratt. (Va.) 51; *Payne v. Commercial Bank*, 6 Sm. & M. (Miss.) 24.

55 *Martin v. Webb*, 110 U. S. 7, 14; *Bank v. Dunn*, 6 Pet. (U. S.) 51; *Olney v. Chadsey*, 7 R. I. 224; *Hodge v. First Nat. Bank*, 22 Gratt. (Va.) 51; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 122; *Daviess Co. Sav. Assn. v. Sailor*, 63 Mo. 24, 27; *Merchants' Bank v. Rudolf*, 5 Neb. 527; *Ecker v. First Nat. Bank*, 59 Md. 291.

56 *Bank of Ravenswood v. Wetzel*, 50 S. E. (W. Va.) 886; *Gray v. Farmers' Nat. Bank*, 81 Md. 631.

Contra.—*Wakefield Bank v. Truesdell*, 55 Barb. (N. Y.) 602. See criticism of this case in the *Bank of Ravenswood* case.

57 *Bank of Commerce v. Hart*, 37 Neb. 197.

58 *Bullard v. Bank*, 49 S. E. (Ga.) 615.

31. Liability of Bank for Contracts of Officers Within Scope of Their Authority.

An officer who acts beyond the scope of his authority binds himself,⁵⁹ but not his bank⁶⁰ unless his act is ratified.⁶¹ When acting outside his sphere, the bank is no more responsible for his conduct than for that of any other person.⁶² And this rule has especial force when the action of the officer is fraudulent.

32. Liability of Officer for His Own Acts.

But difficult questions sometimes arise, whether, in doing a particular act, he is acting for the bank, or for an individual. Thus a cashier who received a special deposit without compensation and without the knowledge or authority of the directors was regarded as acting personally, and the bank was not responsible for its loss.⁶³

33. What Acts Can be Ratified.

How far an officer's responsibility may be diverted from himself to his bank by ratification remains for consideration. There are three distinct lines of cleavage.

⁵⁹ *Bank of Hamburg v. Wray*, 4 Strob. (S. C.) 87; see also *Seeberger v. McCormick*, 178 Ill. 404. For the form of action, ground of liability and authorities, see *Mechem on Agency*, §§548, 549; also note in 22 Am. St. Rep. 508.

⁶⁰ *Jones v. First Nat. Bank*, 3 Neb. (Unof.) 73; *Wheat v. Bank*, 9 Ky. L. Rep. 738; *Burris v. Bank*, 70 Mo. App. 675; *City Electric R. v. First Nat. Bank*, 65 Ark. 543. See *Butler v. Am. Toy Co.*, 46 Conn. 136.

⁶¹ *Fleckner v. U. S. Bank*, 8 Wheat. (U. S.) 338, 362; *Burris v. Bank*, 70 Mo. App. 675.

⁶² See Chap. X. §2.

⁶³ *Lloyd v. West Branch Bank*, 15 Pa. 172. See *Comp v. Carlisle Dep. Bank*, 94 Pa. 409, and *Burris v. Bank*, 70 Mo. App. 675. For other controversies wherein the officer was acting for the bank or for the parties, see *Bobb v. Savings Bank*, 64 S. W. (Ky.) 494; *Mt. Vernon Bank v. Porter*, 148 Mo. 176; *Goshorn v. People's Nat. Bank*, 32 Ind. App. 428; *School District v. DeWeese*, 100 Fed. 705; *Jackson Co. Bank v. Parsons*, 112 Wis. 265. A cashier who had authority to bind his bank by his checks for funds deposited in another bank, drew checks payable to customers of his bank, endorsed them in the names of the payees to persons who collected them. As the cashier had authority to issue the checks his conduct was binding on his bank, while the payees were regarded as fictitious persons. *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556.

(a.) First, a bank can ratify all the acts of an officer which it could legally make and thereby relieve him of all responsibility. This rule is easily understood and its enforcement free from difficulty.

(b.) Should he, when acting, regard himself as the possessor of the authority and act by worthy motives, yet, in truth, transcend his authority, and the bank, in other words the directory, refuse to recognize or ratify his act or accept its benefits, he would be bound and without redress against the bank. His act, however well meant, would be his own, for which the bank could in no way be held responsible. But if the bank accepted the benefit, though refusing to ratify his act, it would be bound.⁶⁵ And this applies, we think, in all cases whether the bank had authority to make the contract or not.

A great variety of acts have been done by an officer, either knowing or not knowing that he had authority, from the con-

64 *Burris v. Bank*, 20 Mo. App. 675; *Roe v. Bank*, 167 Mo. 406. See §37. "It is not necessary that knowledge should be actual or that assent should be formal, to effect such a result. If the directors, in the exercise of ordinary care, ought to have known of the execution of the contract [in controversy] it is in law as if they knew. Knowing, then, assent might be shown by silence and acquiescence, as well as by formal vote of ratification." *Smith v. Bank*, 54 At. (N. H.) 385. The cashier of a bank shipped for A in the bank's name wheat to be sold on his account. Although the cashier had no authority to do this, yet having received the proceeds it was bound to account for them to A. *Landis v. Moorhead Nat. Bank*, 74 Minn. 222.

65 *First Nat. Bank v. Oberne*, 121 Ill. 25. The presumption of ratification of an unauthorized act of an officer clearly beneficial to the bank, will arise from slight circumstances. *Pierce City Bank v. Hughlett*, 84 Mo. App. 268. The president of a bank agreed with a debtor that, in selling property pledged to the bank for his debt, he would re-sell it to him for the sale price. The bank repudiated the agreement and sought to retain the property. It was held that the president had no authority to make such an agreement, and consequently that the bank was not bound thereby, unless it had received some benefit therefrom or had ratified the transaction. *Memphis City Bank v. Smith*, 110 Tenn. 335. But his conduct was fraudulent and his knowledge was that of the bank; it was therefore a party thereto and responsible therefor. *Ibid*; *Tagg v. Tenn. Nat. Bank*, 9 Heisk. (Tenn.) 479; *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394.

sequence of which his bank escaped because they were not within the scope of the officer's authority and had not been ratified. One of these was an answer of a cashier to a letter of inquiry addressed to him by another cashier concerning the business standing of a person. The answer, though false, was regarded as a letter of courtesy, outside the business of the bank.⁶⁶ But the same court in a later case declared that "if the false answer to the query had been made by the cashier, with the privity of the president, in the business and for the benefit of the bank, the bank would have been liable." The line of responsibility thus drawn will surely prove difficult to apply.⁶⁷

(c.) Again, while keeping within the scope of his authority if he should act in a fraudulent manner, and his bank should receive and retain the benefit of his act, it would thereby become bound. Thus an agent, who, acting under the authority of the cashier, induces a person to sign notes as surety by agreeing they shall not be used by the bank until another person has signed them, binds the bank to the condition. And this is true, although his conduct was unauthorized by, and the knowledge of it was concealed from its officers.⁶⁸ "For the principal cannot take advantage of the security obtained for him by his agent, without giving effect to the conditions under which the security was agreed to be given."⁶⁹

(d.) Second, contracts which neither the bank nor any officer has authority to make. These contracts fall into two classes: those which though unlawful are beneficial, and those which are not. The first class may be ratified, but not the others.⁷⁰ In truth, contracts of the first class are not ratified,

66 *First Nat. Bank v. Marshall & Ilsley Bank*, 28 C. C. A. 42.

67 *Hindman v. First Nat. Bank*, 39 C. C. A. 1, 6, revg. 86 Fed. 1013.

68 *McKay v. Commercial Bank*, L. R. 5 P. C. (Eng.) 394.

69 *Commercial Bank v. Smith*, 34 Nova Scotia, 426, 435.

70 *McCullough v. Moss*, 5 Denio (N. Y.) 567; *Bank v. Patchin Bank*, 13 N. Y. 309; *Downing v. Mt. Washington Road Co.*, 40 N. Y. 230; *City of Memphis v. Memphis Gayoso Gas Light Co.*, 9 Heisk. (Tenn.) 531. In *National Bank v. Fridenberg*, 206 Pa. 243, 248, the bank authorized its cashier to engage in stock speculation for the bank. In some of his ven-

and strictly cannot be, but the bank having received a benefit from them, becomes responsible therefor. Thus if a bank had no authority to borrow money, and the president should, nevertheless, make a loan on its behalf, the bank would be obliged to refund the money.⁷¹ In a recent controversy, involving the question, in which a company sought to repudiate the payment of a note, on which it had received the money, for the reason that the bank had no authority to issue it, the court remarked that "it cannot be heard to deny liability thereon, even though its officers had no authority to make it, and the corporation no legal authority to empower them to do it. The doctrine of *ultra vires* cannot be invoked by a corporation for the purpose of escaping a burden resulting from a contract so far executed that the corporation has received the benefit."⁷²

(e.) Though the bank in ratifying his act exceeds in effect its own authority, the wrong-doer is not thereby relieved from liability. Perhaps the rule is not as clearly established as it might be, yet this certainly is the trend of judicial opinion. An assault perpetrated on a customer is none the less an assault for which he is liable, though the bank may also become a participant by adopting the act as its own.⁷³

(f.) The third class of acts are those beyond the authority of the bank to perform and from which it derives no benefit.

tures he was successful, in others he lost. The bank quite willingly accepted the profits; but kicked at the losses. It defended on the ground that the cashier did not have authority to engage in the later ventures, while admitting his authority to act in the earlier and successful ones. Unquestionably the business was unlawful, it could neither be authorized nor ratified, yet as the bank had accepted the benefits and the different speculations were rightly regarded as parts of a single enterprise, the bank was responsible for the loss.

71 *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 635.

72 *Bullen v. Milwaukee Trading Co.*, 109 Wis. 41, 45; *Ditty v. Dominion Nat. Bank*, 22 C. C. A. 376.

73 *City Nat. Bank v. National Park Bank*, 32 Hun (N. Y.) 105, 110, the court citing *New York & N. H. R. v. Schuyler*, 34 N. Y. 30; *Fulton Bank v. New York & Sharon Canal Co.*, 4 Paige (N. Y.) 127; *Bank v. Davis*, 2 Hill (N. Y.) 451; *Holden v. New York & Erie Bank*, 72 N. Y. 286; *Atlantic Bank v. Merchants' Bank*, 10 Gray (Mass.) 532.

These the directors have no right to approve, and in attempting to do so violate their duty, without rendering their action effective.⁷⁴ So their action can have no validity; the guilty officers are alone responsible for their conduct.⁷⁵

34. Essential Conditions of Ratification.

The essential conditions of ratification are, all the facts relating to the transaction must be known,⁷⁶ and the contract must be ratified entire.⁷⁷ A part cannot be ratified, and a part rejected; all or none is the universal rule.⁷⁸ Once done there can be no revocation.⁷⁹ A subsequent confirmation by the bank is equivalent to a previous command.⁸⁰

35. Mode of Ratifying.

The mode of ratifying may next be considered. This can be done by a resolution of the board of directors,⁸¹ by silence

74 *Sturdevant v. Farmers' & Merch. Bank*, 62 Neb. 472; *Thompson v. West*, 59 Neb. 677; *Metropolitan Stock Exchange v. Lyndonville Nat. Bank*, 76 Vt. 303. See *City of Memphis v. Memphis Gayoso Gas Co.*, 9 Heisk. (Tenn.) 531.

75 *Greeley v. Nashua Sav. Bank*, 63 N. H. 145, 147. See *First Nat. Bank v. Drake*, 29 Kan. 311.

76 *Mills v. Bank*, 11 Wheat. (U. S.) 431; *Fowler v. Brantley*, 14 Pet. (U. S.) 318; *Moors v. Goddard*, 147 Mass. 287. The acts are regarded as ratified only when they are known as they really are, and not as the ratifiers believe them to be. *Bank v. Western Bank*, 13 Bush (Ky.) 526, 533; *Bank v. Miller*, 105 Ill. App. 224, affd. 202 Ill. 410 and cases cited.

77 *Fleckner v. Bank*, 8 Wheat. (U. S.) 338; *Everett v. United States*, 6 Porter (Ala.) 166; *Combs v. Scott*, 12 Allen (Mass.) 493; *Murray v. Nelson Lumber Co.*, 143 Mass. 250.

78 *LaGrande Nat. Bank v. Blum*, 27 Or. 215; *Rudasill v. Falls*, 92 N. C. 222; *Armstrong v. Cache Valley Land Co.*, 14 Utah 450; 4 *Thomp. on Corp.* §§5286, 5317, and note 13 L. R. A. 219. A bank by bringing an action on a loan made by one of its officers ratifies his action in making the contract, and is chargeable with the knowledge possessed by the agent that the loan was illegal, if this was the truth. *Singleton v. Bank of Monticello*, 113 Ga. 527.

79 *Cook v. Tullis*, 18 Wall. (U. S.) 332, 338. The retroactive efficacy of the ratification is subject to the qualification that the intervening rights of third persons cannot thereby be defeated.

80 *Planters' Bank v. Sharp*, 4 Sm. & M. (Miss.) 75.

81 *Fleckner v. Bank of United States*, 8 Wheat. 338, 363.

when all the facts are known and no objection is made within a reasonable time;⁸² or by retaining the fruits of the contract.⁸³ Though directors generally can act only as a board, in ratifying they can act individually.⁸⁴ Stockholders also can ratify the acts of their directors by express resolution and in other ways,⁸⁵ but not an act that is invalid.⁸⁶

How shall silence on the part of the directors be regarded? This question has stirred much judicial discussion. Is not this the correct answer? If the directors know and keep silent, their silence must be regarded as an approval of what has been done; if they do not know, their silence signifies nothing. But to remain silent during the examination of an officer cannot be regarded as an approval or ratification of his conduct.⁸⁷

82 *Winsor v. Lafayette Co. Bank*, 18 Mo. App. 665; *Dietz v. City Nat. Bank*, 42 Neb. 584; *Baldwin v. Burrows*, 47 N. Y. 199; *Owings v. Hull*, 9 Pet. (U. S.) 607; *Wilson v. Pauly*, 72 Fed. 129. But an entry on the books of the bank does not have that effect unless it is known. *First Nat. Bank v. Drake*, 29 Kan. 311; *Bank v. Western Bank*, 13 Bush (Ky.) 526; *German Nat. Bank v. Grinstead*, 21 Ky. L. Rep. 674; *La Grande Nat. Bank v. Blum*, 27 Or. 215; *Rich v. State Nat. Bank*, 7 Neb. 201; *Johnston v. Milwaukee Investment Co.*, 49 Neb. 68.

83 *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604; *Tradesmen's Nat. Bank v. Bank*, 6 N. Y. App. Div. 358; *City Nat. Bank v. National Park Bank*, 32 Hun (N. Y.) 105; *First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *Smith v. Lawson*, 18 W. Va. 212; *Hodge v. First Nat. Bank*, 22 Gratt. (Va.) 51; *Belleville Sav. Bank v. Winslow*, 35 Fed. 471. "Where an officer of a corporation assumes to have power to bind the corporation, and enters into a contract for the corporation, and the corporation receives the fruits and benefits of the contract and retains them with knowledge of the circumstances attending the making of the contract, it is estopped from rescinding or undoing the contract." *First Nat. Bank v. Greenville Oil & Cotton Co.*, 24 Tex. Civ. App. 645, 649.

84 *Bank v. Rutland & Wash. R.*, 30 Vt. 159, 169.

85 *Bassett v. Fairchild*, 132 Cal. 637; *Morisette v. Howard*, 62 Kan. 463; *Silsby v. Strong*, 38 Or. 36; *First Nat. Bank v. East Omaha Box Co.*, 2 Neb. (Unof.) 820. But see *Union Gold Mining Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565, 575; *Gashwiler v. Willis*, 33 Cal. 11, 20. See also Chap. IV. §37.

86 *Curtin v. Salmon River Mining Co.*, 130 Cal. 345; *First Nat. Bank v. East Omaha Box Co.*, 2 Neb. (Unof.) 820.

87 *Sturdevant v. Farmers' & Merch. Bank*, 62 Neb. 472; *Cincinnati R. v. Citizens' Nat. Bank*, 56 Ohio St. 351.

36. Officer Cannot Ratify His Own Act.

An officer cannot ratify his own act. If he discounts his note, regarding this as an act of the bank, it is not ratified simply by payment. It would be otherwise if he paid it and the directors, afterward learning of the transaction, maintained silence.⁸⁸

But a different rule applies to directors who give up the entire management of the bank to one or more officers. In such a case "it will be presumed that he is authorized by the corporation to do any act that the corporation might lawfully do, and the acts of such officer in transacting the business of the corporation need no authorization or ratification from a nominal board of directors."⁸⁹

37. Effect of Ratifying.

The effect of ratification is to hold the bank responsible for the officer's conduct, and to relieve him from all liability to the bank and to other parties. Both bank and officer are invested with the same rights and duties as if the transaction had been previously authorized. The bank assumes the burden of the act; the agent is absolved from liability, whether he exceeded or departed from his authority.

38. Liability of Officer to His Bank for Frauds.

An officer is liable to his bank in every case of fraud and misapplication of its funds.⁹⁰ Whatever form his misapplica-

⁸⁸ Rhodes v. Webb, 24 Minn. 292.

⁸⁹ Tourtelot v. Whithed, 9 N. Dak. 467, 474; Cox v. Robinson, 27 C. A. 120; Wash. Sav. Bank v. Butchers' & Drov. Bank, 107 Mo. 133; Kraniger v. People's Building Society, 60 Minn. 94; Martin v. Webb, 110 U. S. 7; Calvert v. Idaho Stage Co., 25 Or. 412; Creeder v. Loud Lumber Co., 86 Mich. 541; Wing v. Commercial & Sav. Bank, 103 Mich. 565; Carpy v. Dowdell, 115 Cal. 677.

⁹⁰ Knapp v. Roche, 44 N. Y. Super. Ct. 247; First Nat. Bank v. Drake, 29 Kan. 311; Trust Company v. Weed, 14 Phila. 422; Jackson v. Ludeling, 21 Wall. (U. S.) 616; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587; Koehler v. Black River Falls Iron Co., 2 Black (U. S.) 715; Drury v. Cross, 2 Wall. (U. S.) 299; Dodge v. Woolsey, 18 How. (U. S.) 331; Hill v. Frazier, 22 Pa. 320. See Chap. VII. §15.

tion may take, his bank can do nothing to whiten or legalize his act. Bank directors have often attempted to do so, but have succeeded only in implicating themselves.⁹¹ A fraud cannot be ratified; its parentage cannot be transferred from the offender to the bank.⁹²

Thus, an officer is liable for using the bank's money in his private business by discounting his own notes;⁹³ for making worthless loans to others and concealing them from the directors;⁹⁴ for taking overdrafts contrary to law or without proper security;⁹⁵ for issuing fictitious notes;⁹⁶ for lending the securities of the bank for inspection,⁹⁷ for all contracts made with his bank to his own evident interest and contrary to that of the bank.⁹⁸

Moreover, the knowledge of another officer of the fraud does not lessen the guilt of the wrong-doer, but only implicates the other, rendering him perhaps an accessory.⁹⁹

39. Receiving Misapplied Property.

Furthermore, when several officers are thus guilty of mismanagement, "the action may be against all or it may be against one or more" of them.¹

Again, when an officer is liable and is not relieved by the bank's ratification, the bank may pursue him, and also the funds he may have misapplied.²

⁹¹ See §33.

⁹² See §33.

⁹³ *Rhodes v. Webb*, 24 Minn. 292; *Reed v. Bank*, 6 Paige (N. Y.) 337.

⁹⁴ *First Nat. Bank v. Reed*, 36 Mich. 263.

⁹⁵ *Oakland Bank v. Wilcox*, 60 Cal. 126, 140; *Boker's Estate*, 7 Phila. 479; *Western Bank v. Coldewey*, 83 S. W. (Ky.) 629.

⁹⁶ *Butterworth v. O'Brien*, 39 Barb. (N. Y.) 192.

⁹⁷ *Citizens' Bank v. Wiegand*, 12 Phila. 496.

⁹⁸ *McVeigh v. Bank*, 26 Gratt. (Va.) 188 and cases cited.

⁹⁹ *First Nat. Bank v. Reed*, 36 Mich. 263.

¹ *Western Bank v. Coldewey*, 83 S. W. (Ky.) 629, 631.

² *Lamson v. Beard*, 55 C. C. A. 245; *Gale v. Chase Nat. Bank*, 43 C. C. A. 496; *Anderson v. Kissam*, 35 Fed. 699; *Knapp v. Roche*, 44 N. Y. Super. Ct. 247; *Farmers & Traders' Bank v. Kimball Milling Co.*, 1 S. Dak. 388, and cases cited; *Kitchens v. Teasdale Commission Co.*, 79 S. W. (Mo. App.) 1177. See *Atlantic Bank v. Merchants' Bank*, 10 Gray (Mass.)

40. Liability of Officer to Bank for Negligence.

A bank officer should be diligent, faithful, skilful;³ and the corollary follows that he is liable for negligence in conducting the business.⁴ This has been displayed in many ways; a failure to exercise proper care in the selection or oversight of employes;⁵ to take bonds from them;⁶ to collect paper sent for collection;⁷ to charge endorsers and the like;⁸ in lending to a minor;⁹ in surrendering securities to a debtor without good reason;¹⁰ in buying a note of doubtful worth at a large price;¹¹ in lending improperly.¹²

41. When Stockholders Can Restrain Him for Mismanagement.

When they conduct the business in a grossly negligent manner, systematically disregarding the by-laws, keeping no account of the receipts and expenditures, neglecting to pay the taxes, discounting paper at usurious rates, and in larger amounts to particular individuals than prescribed by law, in short, committing breaches of trust and doing things which may result in forfeiting the bank's charter and subjecting it to a penalty, they may be legally restrained by the stockholders.

532; *Skinner v. Merchants' Bank*, 4 Allen (Mass.) 290. An illegal misapplication of funds by a bank officer is waived by his giving a new note without any abatement for them. *Girard Bank v. Richards*, 4 Phila. 250.

3 *Commercial Bank v. Ten Eyck*, 48 N. Y. 305; *Apperson v. Exchange Bank*, 10 S. W. (Ky.) 801.

4 "Bank officers are but agents of the corporation, and if they transcend or abuse their powers are as much responsible to their principal as anyone." *Austin v. Daniels*, 4 Denio (N. Y.) 299, 301; *First Nat. Bank v. Reed*, 36 Mich. 263, 268.

5 *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 Paige (N. Y.) 127, 137.

6 *Ponchartrain R. v. Paulding*, 11 La. 41.

7 *Sweet v. Montpelier Sav. Bank & Trust Co.*, 84 Pac. (Kan.) 542, first trial, 69 Kan. 641.

8 *Bidwell v. Mason*, 10 Minn. 13.

9 *Brown v. Farmers' & Merch. Nat. Bank*, 88 Tex. 265.

10 *Lawrence v. Stearns*, 79 Fed. 878; *Citizens' Bank v. Wiegand*, 5 Pa. Week. Notes 12.

11 *Stearns v. Lawrence*, 28 C. C. A. (U. S.) 66, 74, affg. 79 Fed. 878.

12 *Second Nat. Bank v. Burt*, 93 N. Y. 233.

Before thus acting the directors must be required to do this in the name of, and for the bank unless they are participating in the mismanagement to such a degree that the demand would be purely a formal useless proceeding.¹³

In such proceedings one or more of the stockholders may sue in behalf of all whenever the bank is unwilling to move against them. Very generally officers are united in their wrongdoings so that no action can be begun in the name of their bank. Then it must be made a defendant with the officers. As the judgment, whatever it may be, is for the benefit of the bank, it is of no consequence how many stockholders unite in the proceeding.

Formerly the right of a bank or its stockholders to proceed against its directors or other officers who were disregarding their duty was questioned or wholly denied, and the only remedy seemed to be to wait until their term of office expired and then fill their places with others. But this method has proved too slow and dangerous, and the bank, its stockholders and creditors may proceed by the swifter method of injunction whenever a case is clearly proved of mismanagement. It is true that not every indiscretion of a manager will justify a court in employing this drastic remedy.¹⁴ The application must be addressed to the discretion of the court, and a very clear case of gross mismanagement must be shown to justify judicial interference with their management. But when such a case is shown this will be done. Such action against corporations in general is not uncommon, but happily the occasions are less frequent for similar action against banks; or their mismanagement has gone so far before the discovery of it, that some other remedy was required.

42. Statute of Limitations. Survival of Liability.

An officer's liability continues, unless otherwise ended, until the operation of the statute of limitation. As he is exercising

¹³ See Chap. VIII. §§37-39.

¹⁴ See *Killen v. Barnes*, 106 Wis. 546.

an implied trust, the statute begins to work from the time of committing the wrong.¹⁵ But if this has been concealed, then, by the more general rule the statute also is silent and ineffective until the wrong has been discovered.¹⁶

Again, the liability of a bank's officers for their misconduct survives the insolvency, or death, of the bank and is assignable. The assignee, receiver or other representative therefore can proceed against them therefor,¹⁷ or their estates.¹⁸

43. Liability of Officer to Individuals.

Lastly may be considered the liability of managing officers to individuals. One of the chief causes of complaint against them is for making false representations concerning the condition of their bank whereby sellers or purchasers of its stock,¹⁹ depositors or others are deceived.²⁰ For such a wrong they are liable in an action of deceit.²¹ For all wrongs committed in the course of an officer's employment his bank is liable, but

15 *Landis v. Saxton*, 105 Mo. 486 and cases cited.

16 *Central Bank v. Thayer*, 184 Mo. 61, 94, and cases cited.

17 *Killen v. Barnes*, 106 Wis. 546. See Chap. VIII. §41.

18 *Western Bank v. Coldeway*, 83 S. W. (Ky.) 629.

19 See Chap. VII. §39. *Prewitt v. Trimble*, 92 Ky. 176. A president or other officer who misrepresents the condition of his bank to a stockholder in order to induce him to sell his stock at too low a price is liable. *Stewart v. Harris*, 77 Pac. (Kan.) 277; *Mulvane v. O'Brien*, 58 Kan. 463; *Fisher v. Budlong*, 10 R. I. 525; *Rothmiller v. Stein*, 143 N. Y. 581; *Oliver v. Oliver*, 118 Ga. 362. In an action to recover for selling stock to the president at a fraudulently lower price, it cannot be shown in the way of defence that dividends declared at a later period accrued from debts charged off as loss long prior to the time the stock was sold. *Stewart v. Smith*, 82 Pac. (Kan.) 482.

Contra.—*Krumphaar v. Griffiths*, 151 Pa. 223; *Haarstick v. Fox*, 9 Utah 110; *Crowell v. Jackson*, 53 N. J. Law 656; *Board of Tippecanoe Co. v. Reynolds*, 44 Ind. 509.

20 *Killen v. Barnes*, 106 Wis. 546.

21 *Prewitt v. Trimble*, 92 Ky. 176. The injured party may demand a recession of the contract and return of the purchase money, if it has been paid; or he may bring his action of deceit for damages. *Ibid.* See Chap. VI. §9. "A party who is induced to purchase property by deceit and fraud has an election of remedies. He may rescind the contract and to do this he must return or offer to return what he has received under it. On the other hand, he may affirm the contract, and sue for damages occasioned

not the wrong-doer himself.²² But for an act committed of his own free will, without reference to his official position, he alone is responsible; for example, a slanderous remark against a depositor.²³ Of course, an officer can be relieved from liability to a creditor by his acquiescence in, or ratification of the officer's conduct.²⁴

The right to hold a director for deceit in buying and selling the stock of his bank requires fuller statement. The old theory that he is to be regarded as a stranger in such transactions is no longer accepted in all jurisdictions. As he certainly is an agent in a general sense for the bank, there is no sound reason for excluding its constituents from the application of the principle. Justice Lamar has expressed the idea with unusual felicity: "That he is primarily trustee for the corporation is not intended to make the artificial entity a fetich to be worshipped in the sacrifice of those who in the last analysis are the real parties in interest. No process of reasoning and no amount of argument can destroy the fact that the director is, in a most important and legitimate sense, trustee for the stockholders."²⁵ Wherever the partnership conception of a

by the deceit and fraud, and in that event he is not required to return or offer to return what he has received under the contract." *Binghamton Trust Co. v. Auten*, 68 Ark. 299, 304.

22 *Spring's Appeal*, 71 Pa. 11; *Alexander v. Relfe*, 74 Mo. 495, 517; *Miller v. Burlington & Mo. R.*, 8 Neb. 219, 223; *State v. Morris & Essex R.*, 23 N. J. Law 360, 367; *Denver & Rio Grande R. v. Harris*, 122 U. S. 597, 608; *Salt Lake City v. Hollister*, 118 U. S. 256; *Jordan v. Ala. Great So. Co.*, 74 Ala. 85; *Fishkill Sav. Institution v. National Bank*, 80 N. Y. 162; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505; *Western Maryland R. v. Franklin Bank*, 60 Md. 36; *Wash. Gas Light Co. v. Lansden*, 172 U. S. 534. See Chap. VII. §39.

23 *Etting v. Commercial Bank*, 7 Rob. (La.) 459.

24 *Pease v. Francis*, 25 R. I. 226.

25 See Chap. IV. §11. *Oliver v. Oliver*, 118 Ga. 362, 367; *Stewart v. Harris*, 69 Kan. 498; *Perry v. Pearson*, 135 Ill. 218; *Fisher v. Budlong*, 10 R. I. 525. See *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 589, and *Rothmiller v. Stein*, 143 N. Y. 581.

Contra.—*Deaderick v. Wilson*, 8 Bax. 108; *Carpenter v. Danforth*, 52 Barb. (N. Y.) 581; *Krumbhaar v. Griffiths*, 151 Pa. 223; *Gillett v. Bowen*, 23 Fed. 625. See *Spring's Appeal*, 71 Pa. 11, 20.

corporation prevails there is no difficulty in holding a director to the same rule in buying and selling stock as the cashier, president or other managing officer. If the contention be raised that the same rule ought not to be applied to a director because he may not know the real condition of his bank, then the answer is, he ought to know, and should not be excused for not knowing.

44. Liability of Bank for Officer's Torts.

The law confers no authority on corporations to do wrong; every wrongful act therefore is technically *ultra vires*, nevertheless banks are liable for the acts of their officers to the same extent as individual principals.²⁶ The law recognizes no distinction between them.

(a.) A bank, therefore, may be liable for a malicious prosecution;²⁷ malicious attachment;²⁸ for slander and libel;²⁹ as-

²⁶ *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.*, 11 *Humph. (Tenn.)* 1, 30; *Wachsmuth v. Merchants' Nat. Bank*, 96 *Mich.* 426; *McDougald v. Bellamy*, 18 *Ga.* 411; *Merchants' Bank v. State Bank*, 10 *Wall. (U. S.)* 604, 644; *National Bank v. Graham*, 100 *U. S.* 699, 702; *Nevada Bank v. Portland Nat. Bank*, 59 *Fed.* 338; *Pronger v. Old Nat. Bank*, 20 *Wash.* 618, and cases cited; *American Nat. Bank v. National Wall Paper Co.*, 23 *C. C. A.* 33; *New York and New Haven R. v. Schuyler*, 34 *N. Y.* 30; *Miller v. Burlington & Mo. R.*, 8 *Neb.* 219, 223. But a bank is not liable for the malicious protest of a bill of exchange by a notary, because he is a public officer, unless it sanctions or ratifies his act. *May v. Jones*, 88 *Ga.* 308. A bank may be held as a party to a conspiracy to defraud, even in a transaction outside its charter. *Zinc Carbonate Co. v. First Nat. Bank*, 103 *Wis.* 125. A minor had given a note to a bank and before renewing it inquired of the bank's officers concerning its financial condition. Though knowing it was insolvent, they declared otherwise, whereupon he renewed the note, his father signing as surety. Both were relieved by the bank's fraudulent conduct from payment. *Seeley v. Seeley-Howe-Le-Van Co.*, 128 *Iowa* 294.

²⁷ *Goodspeed v. East Haddam Bank*, 22 *Conn.* 530; *Wheless v. Second Nat. Bank*, 1 *Bax. (Tenn.)* 469; *Iron Mountain Bank v. Mercantile Bank*, 4 *Mo. App.* 505; *Reed v. Home Sav. Bank*, 130 *Mass.* 443, 445; *Gillett v. Mo. Valley R.*, 55 *Mo.* 315. *Dow Cattle Co. v. Des Moines Nat. Bank*, 98 *N. W. (Iowa)* 918. In such an action injuries to credit, character or business are too remote for estimating damages. *Ibid.* A corporate bank can act through its agents and servants, and does so act. It can also think by its officers, agents, and servants, and does so think, and it can harbor malice

sault and battery;³⁰ fraud and deceit;³¹ false statements³² and reports;³³ wrongful representations concerning the credit of individuals;³⁴ or the worth of securities purchased for, or sold to its customers;³⁵ or other representations pertaining to the business of the bank.³⁶ "In every such case," says Justice Lumpkin, "the principal holds out his agent as fit to be trusted

and seek revenge through these same officers, agents, and servants; and when they act maliciously in the service of the corporation, and within the scope of the authority delegated to them, the law ascribes their malice to the corporation and holds it to the same civil liability as if the malicious act had been done by a natural person." *Bland, Pres. J., Dwyer v. St. Louis Transit Co.*, 108 Mo. App. 152. To enter a judgment note late at night and immediately levy execution thereon by breaking into the debtor's store, the bank knowing that the creditor is solvent and willing to pay his note, is not a sufficient foundation for the action. *Docter v. Riedel*, 96 Wis. 158. See dissenting opinion by Marshall, J. It has been contended, however, that to collect a judgment in a harsh manner with a malicious purpose to injure the judgment debtor, is an actionable wrong. *Smith v. Weeks*, 60 Wis. 94.

28 *Wheless v. Second Nat. Bank*, 1 Bax. (Tenn.) 469; *Jefferson Co. Sav. Bank v. Eborn*, 84 Ala. 529.

29 *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48; *Central R. & Bkg. Co. v. Smith*, 76 Ala. 572.

30 *Edwards v. Union Bank*, 1 Fla. 136, containing an elaborate discussion of the subject.

31 *Cragie v. Hadley*, 99 N. Y. 131; *Mechanics' Nat. Bank v. Miners' Bank*, 13 Pa. Week. Notes, 515; *Bank v. Schuylkill Bank*, 1 Pars. Sel. Cas. (Pa.) 180.

32 *Hindman v. First National Bank*, 39 C. C. A. 1; *Manufacturers' Bank v. Scofield*, 39 Vt. 590; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. (Eng.) 259.

Contra.—*Mapes v. Second Nat. Bank*, 80 Pa. 163.

33 *Ellerbe v. National Ex. Bank*, 109 Mo. 445.

34 *Hindman v. First National Bank*, 39 C. C. A. 1; *Pronger v. Old Nat. Bank*, 20 Wash. 618; *American Nat. Bank v. Hammond*, 25 Colo. 367; *Binghamton Trust Co. v. Auten*, 68 Ark. 299; *Mackay v. President*, L. R. 5 P. C. (Eng.) 402; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. (Eng.) 259. See *First Nat. Bank v. Marshall & Ilsley Bank*, 28 C. C. A. (U. S.) 42.

35 *Carr v. National Bank*, 167 N. Y. 375; *Binghamton Trust Co. v. Auten*, 68 Ark. 299.

36 *Waxahachie Nat. Bank v. Bielharz*, 94 Tex. 493.

and thereby in effect warrants his fidelity and good conduct in all matters of the agency."³⁷

(b.) A bank is not liable for the tortious act of an officer outside the scope of its authority. If he should go beyond the range of his duties, and of his own will do an unlawful thing, he would be personally liable, but not the bank.³⁸

To this principle the limitation formerly noted must be added. If the bank is benefited by the wrongful act, and sanctions it, though it cannot strictly do this, the bank is liable therefor, as well as the wrong-doer himself.³⁹ Thus the keeping of property wrongfully taken would render both liable therefor.⁴⁰

(c.) Another limitation may be noticed. A bank might not be liable for a simple act of fraud or crime by an officer or agent while it would be for a continuous course of fraudulent practice, especially if this were open and could have been easily detected.⁴¹

(d.) When the wrong consists of a false statement made by an officer to render the bank liable therefor it must be a fact as distinguished from an opinion. The distinction, though resting on a just foundation, is not always easily drawn. In one of the latest cases the court declared that when a statement is uttered as a fact material to the transaction to which it relates, so that the addresser may reasonably treat it as a fact and act accordingly, it is to be regarded as a fraudulent representa-

37 *McDougald v. Bellamy*, 18 Ga. 411, 432. "A corporation may be liable in tort, even though a malicious intent is necessary to be proven." *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426, 430.

38 *Etting v. Commercial Bank*, 7 Rob. (La.) 459; *Thomson v. Sixpenny Sav. Bank*, 5 Bos. (N. Y.) 293; *Mechanics' Bank v. New York & New Haven R.*, 13 N. Y. 599, 633; *Central R. & Bkg. Co. v. Smith*, 76 Ala. 572, 584; *Clark v. Metropolitan Bank*, 3 Duer (N. Y.) 241, 249; *Gillett v. Mo. Valley R.*, 55 Mo. 315; *Miller v. Burlington & Mo. R.*, 8 Neb. 219.

39 *Thomson v. Sixpenny Sav. Bank*, 5 Bos. (N. Y.) 293; *Texas Mfg. Assn. v. Dublin Compress Co.*, 38 S. W. (Tex. Civ. App.) 404.

40 *Manhattan Life Ins. Co. v. Farmers & Citizens' Nat. Bank*, 10 Blatch. (U. S.) 344; *City Nat. Bank v. National Park Bank*, 32 Hun (N. Y.) 105, 110.

41 *Cutting v. Marlor*, 78 N. Y. 454, 460.

tion. When the representations will bear either construction, expressions of opinion or statements of fact, the jury must determine which they are.⁴²

(e.) No officer can authorize another to perpetrate a wrong. Consequently, if an officer should act wrongly he could not defend himself by proving that he had been instructed to act in this manner.⁴³

42 *American Nat. Bank v. Hammond*, 25 Colo. 367; *Teague v. Irwin*, 127 Mass. 217; *Sterne v. Shaw*, 124 Mass. 59. When a president of a bank sells its stock at excessive prices based on fraudulent statements, he cannot compel the bank to reimburse him for the damage he has been compelled to pay the purchaser on the ground that the bank reaped the benefit of the sale, because it was his duty to know the condition of the bank and make a truthful statement of its affairs. *Trimble v. Exchange Bank*, 63 S. W. (Ky.) 1027.

43 *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *Chew v. Ellingwood*, 86 Mo. 260, 272; *Cullen v. Thompson*, 9 Jurist (N. S.) 85. "All persons directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as the agent, or the servant of another, and the reason is plain, for the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in the committing of a fraud." *Ibid* 88.

CHAPTER X.

AUTHORITY AND LIABILITY OF MINOR OFFICERS AND SPECIAL AGENTS.

- | | |
|--|--|
| 1. His authority is limited. | 8. Ratification of his conduct. |
| 2. To what extent a customer is bound by the authority of each particular officer. | 9. Appointment of a special agent. |
| 3. The mode of executing his authority does not affect an outsider. | 10. Especially to make loans. |
| 4. Bank is liable for his mistakes. | 11. Effectiveness of parol authority. |
| 5. He is not personally liable for his own mistakes. | 12. Extent of authority. |
| 6. He should give information of violations of duty by other officers. | 13. Validity of contracts in which agent is personally interested. |
| 7. Authority of a minor official when acting temporarily for a higher official. | 14. Imputation of his knowledge to the bank. |
| | 15. Effect of his declarations. |
| | 16. Responsibility of bank for his conduct. |
| | 17. Personal liability of agent. |
| | 18. Ratification of his conduct. |

1. His Authority is Limited.

To complete the inquiry begun in the preceding chapter, the authority and liability of minor officials and special agents must be described. Unlike the principal officers, their authority is defined with more exactness; there is no wide margin of indefinite powers.¹ Their authority is limited;² and, if trans-

¹ Walker v. St. Louis Nat. Bank, 5 Mo. App. 214, 217.

² Whitehouse v. Bank, 48 N. Y. 239; Potter v. Merchants' Bank, 28 N. Y. 641; Hepburn v. Citizens' Bank, 2 La. Ann. 1007; Mechanics & Traders' Bank v. Banks, 11 La. 260. A paying teller can act as an agent of a notary public in demanding payment of a note by inquiring of the bookkeeper whether a deposit has been made to pay it. Browning v. Andrews, 3 McLean (U. S.) 576. The statements of a bank bookkeeper to a customer of a bank who had left a draft for collection regarding its payment are admissible in an action brought by him for the money. Simpson v. Waldby, 63 Mich. 439.

cended, the bank, unless ratifying or adopting their acts, is not bound. A statement, for example, made by the teller of a bank to the holder of a check that an endorsement thereon is genuine, is not binding, for the reason that he goes quite beyond his authority in expressing such an opinion.³ For the same reason a receiving teller, in receiving a deposit, cannot vary the ordinary terms or conditions on which deposits are received;⁴ or agree to receive a check as cash contrary to the custom of the bank;⁵ or receive a deposit when the institution is insolvent.⁶ Nor can any clerk erase the name of the co-maker of a note;⁷ or pledge a note belonging to the bank.⁸

2. When Customer is Bound by Authority of Particular Officer.

Although most of the duties of the minor officers are clearly defined, the ancient rule is somewhat relaxed, that a minor officer cannot bind his bank when acting outside his narrow province without the knowledge and command of his superiors.⁹ The rule has been changed for the security of persons who do business with banking institutions. It is quite impracticable for the outside public to know all the divisions of duty between bank officers, especially those of a great bank, in conducting its business.¹⁰ Some principles, though, are fixed, which no outsider can ignore.

3 Walker v. St. Louis Nat. Bank, 5 Mo. App. 214.

4 Riley v. Albany Sav. Bank, 36 Hun 513, 517, *affd.* 103 N. Y. 669; Whitehouse v. Bank, 48 N. Y. 239.

5 Strong v. King, 35 Ill. 9. But he may receive a check for collection. *Ibid.*

6 Furber v. Stephens, 35 Fed. 17. See Chap. VI. §6.

7 Marine Bank v. Ferry, 40 Ill. 255.

8 Smith v. Lawson, 18 W. Va. 212.

9 City Nat. Bank v. Martin, 70 Tex. 643; Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604, 650.

10 Munn v. Burch, 25 Ill. 35, 41; City Nat. Bank v. Martin, 70 Tex. 643. The delivery of a package addressed "T, cashier of the A bank," to a clerk or receiving teller while discharging his duties is effective, especially if he has received a similar package which has been credited by the bank. Hotchkiss v. Artisans' Bank, 2 Keyes (N. Y.) 564; Sweet v. Barney, 23 N. Y. 335. See Chap. XII. §2.

Thus if a bank has both a receiving and a paying teller, every customer knows, or ought to know, that the one receives and the other pays deposits.¹¹ Consequently, if he should ask the receiving teller to pay a check, or the paying teller to receive a check, and he should comply, and any wrong should result, the bank could hardly be held responsible for the wrongful action of its officer, because the customer himself would be a participant in the wrong. Thus the depositor of a certified check drawn on another bank inquired of a discount and collection clerk if it was all right. The check had been forwarded to the drawee bank, which had collected it and credited the amount to the other. The clerk replied that the check was "all right." It afterwards proved to be a forgery and was charged back to the depositor. The court declared that the only authoritative response the clerk could give was the collection of the check.¹² On the other hand, if an officer is apparently acting as a substitute for another, a customer may rightfully presume that he is thus acting by command of his superior, and is, therefore, duly authorized to act in this manner. Thus, if a customer should see the receiving teller standing at the paying teller's window, while the latter was absent, he would be justified in assuming that the paying teller was away and that the receiving teller was acting in his place.¹³

3. Mode of Executing His Authority Does Not Affect an Outsider.

Again, an outsider is not presumed to know the bank's instructions to its servants concerning the mode of keeping its

11 *Thatcher v. Bank*, 5 Sand. (N. Y.) 121.

12 *Security Bank v. National Bank*, 67 N. Y. 458.

13 *Munn v. Birch*, 25 Ill. 35, 41. "One wishing to deposit money in a savings bank who delivers it at the counter of the bank to one of its officers who has apparent or ostensible authority to receive the same, is not required to ascertain whether the board of directors has given such officer express authority to receive the deposit. If the conduct of the bank has been such as to justify the depositor in believing that he is authorized to receive the money, the bank cannot exonerate itself from liability by showing that no express authority therefor had been given by the board of directors." *Harrison, J., Burnell v. San Francisco Union*, 136 Cal. 499, 501.

books and transacting its business generally, and therefore is not bound by them. Thus a depositor requested a book-keeper to enter on his pass-book, to his debit, several checks, and after he had done so the depositor drew another check, which he presented for payment and was paid. The bank claimed that the book-keeper's act was not binding because he had no right to enter checks on a pass-book until they had gone through other hands. But the court held otherwise, that the matter was solely between employer and employed. "By placing this book-keeper in that place," said the court, "they accredited him to the public, and if he acted in violation to his instructions they must bear the responsibility."¹⁴

4. Bank is Liable for His Mistakes.

A bank is ordinarily liable for the mistakes, errors, negligence of its minor officials in transacting its business; especially for the non-observance of its rules and customs. Thus should a teller receive money without a deposit ticket or pass-book, required by a rule of the bank, and by mistake should credit the wrong person, the bank would be liable.¹⁵ Likewise a clerk who has authority to certify, binds his bank regardless of the condition of the drawer's account.¹⁶

5. He is Not Personally Liable for His Own Mistakes.

A minor official, like other officials, is not personally liable for a mistake.¹⁷ And if a teller, observing the usage of banks, should receive as cash the check of an individual in good credit, he would not be personally liable therefor should the drawer

¹⁴ *Munn v. Birch*, 25 Ill. 35, 41.

¹⁵ *Jackson Ins. Co. v. Cross*, 9 Heisk. (Tenn.) 283, 287. "Where the power is habitually exercised by an agent, such as a teller of a bank, with the knowledge and acquiescence of the bank, the exercise of the power defines and establishes as to the public, the power so exercised." *Muth v. St. Louis Trust Co.*, 94 Mo. App. 94, 108.

¹⁶ *French v. Irwin*, 4 Bax. (Tenn.) 401; *Cooke v. State Nat. Bank*, 52 N. Y. 96, 114; *Munn v. Burch*, 25 Ill. 35, 41. See Chap. XXIII. §2.

¹⁷ *Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 108; *Union Bank v. Clossey*, 10 Johns. (N. Y.) 271.

have no funds.¹⁸ But if, after receiving such a check, he should consent to take it as his own, and to look to the drawer for payment, he could not return the check to the bank without its consent.¹⁹

A teller who should knowingly assist the cashier or other officer in embezzling the funds of the bank would be personally responsible for the loss to which he had contributed.²⁰ And if he should take the bank's money and apply it to his own use, the cashier's consent would be no shield for his conduct.²¹

6. He Should Give Information of Violations of Duty by Other Officers.

Closely related to the duty of oversight by superior officers of those below them, is the duty of the latter to give information to their superiors concerning any violation of duty by one of their number. While it is no function of theirs to practice espionage, when they clearly see that their superiors are doing wrong, they have a clear duty to perform in putting their knowledge within the light of one or more directors or superiors who are likely to make use of it.²² Thus the Supreme Court of New Jersey remarked of a teller who knew of the wrongful conduct of a cashier "when he was led to believe that the cashier was violating his own duty to the bank and was taking the bank's funds for his own ends, irregularly and without authority from the directors, the teller had no more right to aid in and connive at such appropriation [by maintaining silence] than if it were being perpetrated by a stranger."²³

¹⁸ *Union Bank v. Mackall*, 2 Cranch C. C. (U. S.) 695; *Russell v. Hankey*, 6 Term (Eng.) 12.

¹⁹ *Ibid.*

²⁰ *Hobart v. Dovell*, 38 N. J. Eq. 553.

²¹ *Shew v. Ellingwood*, 86 Mo. 260; *Taylor v. Bank*, 2 J. J. Marsh. (Ky.) 564; *Rochester City Bank v. Elwood*, 21 N. Y. 88. See also *Pittsburg & Chicago R. Co. v. Shaeffer*, 59 Pa. 350; *German-American Bank v. Auth*, 87 Pa. 419; *Engler v. People's Fire Ins. Co.*, 46 Md. 322.

²² *Fiala v. Ainsworth*, 63 Neb. 1.

²³ *Hobart v. Dovell*, 38 N. J. Eq. 553.

7. Authority of a Minor Official When Acting Temporarily for a Higher Official.

What authority does a minor official possess who serves in a higher place during the latter's absence? The question was once answered with respect to a clerk who served as cashier. He had whatever power was necessary "to carry on the usual and ordinary business of the bank."²⁴ But he had no power to pledge the bank's securities "unless they became pledged by the mere act of transmitting for collection."²⁵ An assistant cashier who is acting as teller and cashier can certify a check.²⁶

8. Ratification of His Conduct.

The acts of a teller, book-keeper, or other clerk can be ratified, like those of a president, cashier, and other officers.

9. Appointment of a Special Agent.

Besides its regular officers, a bank may appoint one or more special agents, who may be a director, the president,²⁷ cashier or an unofficial person.²⁸ A bank, too, may serve as an agent of another, which is often done in making collections.²⁹

The initial inquiry relates to the mode of appointing agents. "An agency," says Chief Justice Robertson, "for collecting and securing the debts of a corporation may be created without a written power of attorney authenticated by the corporate

²⁴ *Potter v. Merchants' Bank*, 28 N. Y. 641. The authority of a teller to accept and discount notes may be established by showing that in the absence of the cashier he had often done so with the subsequent approval of the higher officers. *Iowa Nat. Bank v. Sherman*, 97 N. W. (S. Dak.) 12. For the responsibility of a bank for the error of a new clerk temporarily taking the place of a sick one, see *T. B. Clark Co. v. Mount Morris Bank*, 85 N. Y. App. Div. 362.

²⁵ See *Smith v. Lawson*, 18 W. Va. 212, 228.

²⁶ *Clarke Nat. Bank v. Bank of Albion*, 52 Barb. (N. Y.) 592.

²⁷ *Potter v. Merchants' Bank*, 28 N. Y. 641, 650. In *Cake v. Pottsville Bank*, 116 Pa. 264, 270, the president of the bank in effecting a settlement with a debtor and taking a renewal note "was not performing the duties of the directors respecting discounts; he was a mere agent." Yet whatever he did within the apparent scope of his authority to obtain the new security was binding on the bank which accepted and held it.

²⁸ *Potter v. Merchants' Bank*, 28 N. Y. 641, 650.

²⁹ *Clarke Nat. Bank v. Bank of Albion*, 52 Barb. (N. Y.) 592.

seal.”³⁰ It may be implied from his acts. In like manner an attorney can prosecute a suit for a bank without authority under seal.³¹ Says Justice Foster, speaking for the Supreme Court of Maine: “In this state, as well as many others, it is held that the same presumptions are applicable to corporations as to individuals, and that a deed, vote, or by-law is not necessary to establish a contract, promise, or agency.”³² The authority of an agent of a corporation may be inferred from the conduct of its officers, or from their knowledge and neglect to make objections.³³ An agency, however, cannot be inferred by making one’s note payable to a bank.³⁴ Nor will the remission of money to a person as agent of a bank, or as a director, create an agency.³⁵ Nothing short of its action establishing that relation will be effective.³⁶ But if a bank should deliver notes to a person with the request to pass them for the benefit of the institution; or, if he could not, to return them, and he should agree to do so, he would be an agent for transacting the business.³⁷ Lastly, there is a strong presumption in favor of the authority of a person who has acted for a long time as agent, with the knowledge of the bank.³⁸

10. Especially to Make Loans.

In making loans, on several occasions the question has arisen whether the intermediary was the agent of the borrower or the lender. Thus the correspondent of a banking company, who had advertised money to lend, in filling out an application for a loan, stated that the applicant employed him, and not the

30 *Lathrop v. Commercial Bank*, 8 Dana (Ky.) 114, 115.

31 *Osborn v. Bank*, 9 Wheat. (U. S.) 738.

32 *Fitch v. Lewiston Steam Mill Co.*, 80 Me. 34, 38.

33 *Sherman v. Fitch*, 98 Mass. 59, 64; *Badger v. Bank*, 26 Me. 428.

34 *Agricultural Bank v. Burr*, 24 Me. 256.

35 *Heirs of Holman v. Bank*, 12 Ala. 369; *People’s Bank v. St. Anthony’s R. C. Church*, 109 N. Y. 512.

36 *Ibid.*

37 *Towson v. Havre-de-Grace Bank*, 6 Har. & J. (Md.) 47.

38 *Smith v. White*, 5 Dana (Ky.) 376; *McDonnell v. Branch Bank*, 20 Ala. 313; *Cobb v. Lunt*, 4 Me. 503; *Warren v. Ocean Ins. Co.*, 16 Me. 439; *Valentine v. Packer*, 5 Pa. 333.

banking company, to negotiate the loan. The borrower was not estopped from showing that the correspondent was the agent of the banking company.³⁹ In another case a loan was effected by a banking company, which retained therefrom a commission. The company was held to be the agent of the lender, notwithstanding a recital in the application for the loan that the company was the agent of the borrower.⁴⁰

11. Effectiveness of Parol Authority.

A parol authority will support a written contract made by an agent.⁴¹ Justice Foster, after stating the ancient rule, has declared: "It is now well settled that an agent of a corporation may be appointed, certainly by vote, without the use of a seal, whatever may be the purpose of the agency."⁴²

12. Extent of Authority.

The comprehensiveness of a special agent's authority is determined by the same principles as in other cases of special agency. Consequently a person who deals with him must recognize his limited authority; and if exceeded, his bank is not bound thereby unless through ratification.⁴³

13. Validity of Contracts in Which Agent is Personally Interested.

In making contracts wherein he has a personal interest, they are not void, but may be avoided by the bank within a reason-

39 *N. E. Mortgage Security Co. v. Addison*, 15 Neb. 335. See *Philo v. Butterfield*, 3 Neb. 256.

40 *Olmstead v. N. E. Mortgage Security Co.*, 11 Neb. 487; *Cheney v. Woodruff*, 6 Neb. 151.

41 *Welch v. Hoover*, 5 Cranch C. C. (U. S.) 444; *Webb v. Browning*, 14 Mo. 354; *Bank v. Embury*, 33 Barb. (N. Y.) 323.

42 *Fitch v. Lewiston Steam Mill Co.*, 80 Me. 34, 38, citing *Bank v. Patterson*, 7 Cranch (U. S.) 299; *Fleckner v. U. S. Bank*, 8 Wheat. (U. S.) 338; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 231. An agent who is required to produce a sworn copy of his appointment complies by furnishing such a copy even though it does not state that he compared it with the original. *Welch v. Hoover*, 5 Cranch C. C. (U. S.) 444.

43 *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24.

able time.⁴⁴ This is the modern rule applying to nearly all agents.

14. Imputation of His Knowledge to the Bank.

His knowledge concerning the bank's affairs is also, under some conditions, imputed to the institution. If acquired while engaged in serving the bank, his knowledge is clearly imputed;⁴⁵ if acquired before his service began, by some authorities the principle does not apply.⁴⁶ The reason is, as he has not charged his mind therewith, very likely the knowledge has faded out. But the better rule is, the knowledge is imputed if it was acquired so closely to the time of his appointment, or was so important that it could hardly have been forgotten.⁴⁷ In applying this rule, a bank that employed a person to make a conveyance of land, who knew of a defect in the title, was regarded as having notice of the fact, although the conveyancer's knowledge of the imperfection had been previously acquired.⁴⁸

"Of course the knowledge must be that of a person who is executing some agency, and not acting merely in some ministerial capacity, as servant or clerk."⁴⁹ For example, if the con-

44 *Eastern Bank v. Taylor*, 41 Ala. 93, 100.

45 Chap. XI. §6. A borrower from a bank presented collaterals to the assistant cashier, who had authority to represent the bank in the transaction, and directed the borrower in accordance with custom to take the collateral to a note teller having charge of such business to be checked. A notice to the teller of the rights of a third person in one of the securities was notice to the bank. *Zeis v. Potter*, 44 C. C. A. 665, 670. "To hold that the knowledge of the teller in this instance should not be binding on the bank would be to establish for such institution an effective, but most unreasonable and unfair method of evading just and wholesome responsibility under the law."

46 *Houseman v. Girard B. & L. Assn.*, 81 Pa. 256; *Hood v. Fahnestock*, 8 Watts (Pa.) 489; *Bracken v. Miller*, 4 Watts & S. (Pa.) 102; *Plympton v. Preston*, 4 La. Ann. 356.

47 *Fairfield Sav. Bank v. Chase*, 72 Me. 226; *Hoover v. Wise*, 91 U. S. 308, 310; *Hart v. Farmers' & Mech. Bank*, 33 Vt. 252. See review of cases by Bradley, J., in *Distilled Spirits case*, 11 Wall (U. S.) 356. A more rigid rule is held in *Bank v. Davis*, 2 Hill (N. Y.) 451.

48 *Fairfield Sav. Bank v. Chase*, 72 Me. 226.

49 *Ibid.*

veyancer "had merely taken the acknowledgment of the deed to the bank, or had transcribed the deed as a clerk or a copyist, such acts would not have enforced a duty to impart his knowledge to the bank."⁵⁰

Whenever he has acted as an agent for both parties, or as agent of the borrower in transactions with loan companies in making conveyances and like matters, any knowledge, as the agent of the lender, that he might have of imperfections in the conveyance, cannot be imputed to the company.⁵¹ Nor will his knowledge concerning a transaction in which he is defrauding his bank be imputed to it.⁵²

15. Effect of His Declarations.

With respect to declarations, whenever they are made within the scope of his authority, they are admissible.⁵³ But when made subsequent to a contract to which they relate, they cannot be admitted against the bank.⁵⁴ Nor can they be if they were made before the creation of his agency,⁵⁵

16. Responsibility of Bank for His Conduct.

A bank is responsible for the negligence or misconduct of its agents. Perhaps the reason for the rule has been as forcibly stated by Justice Shepley as by any one. "Why should a corporation or its stockholders be permitted to select unfaithful agents or directors, who, in the exercise of the powers conferred upon them in making contracts or settlements with innocent persons, commit frauds upon the corporation, and then claim to be relieved from the effect of those contracts and settlements and the consequences of their own conduct in the selection of such agents, and to throw their losses, or any part of them, upon the innocent parties, instead of being required to

⁵⁰ Ibid.

⁵¹ *Caughman v. Smith*, 28 S. C. 143.

⁵² *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516.

⁵³ *Spalding v. Bank*, 9 Pa. 28.

⁵⁴ *Betts v. Planters' & Merch. Bank*, 3 Stew. (Ala.) 18.

⁵⁵ *First Nat. Bank v. Anderson*, 28 S. C. 143.

abide by them and being left to obtain redress from their own fraudulent agents."⁵⁶

17. Personal Liability of Agent.

An agent is not personally liable whenever he has exercised ordinary care.⁵⁷ Nor is he liable for a loss occasioned by his mistake in a doubtful matter of law.⁵⁸ Nor is he liable for disregarding instructions "in case of extreme necessity arising from unforeseen emergencies," or of impossible performance.⁵⁹ But he is liable for a palpable mistake or plain violation of instructions in transacting the business of the bank.⁶⁰

18. Ratification of His Conduct.

Of course a bank can ratify the unauthorized act of a special agent as though it were the unauthorized act of a regular officer. Such a ratification would be equivalent to original authority, as in the case of natural persons. Nor need the ratification be by formal vote or resolution.⁶¹

56 *Frankfort Bank v. Johnson*, 24 Me. 490, 503.

57 *Rechtscherd v. Accommodation Bank*, 47 Me. 181.

58 *Mechanics' Bank v. Merchants' Bank*, 6 Met. (Mass.) 13.

59 *Switzer v. Connett*, 11 Mo. 88.

60 *Clark v. Bank*, 17 Pa. 322; *Hays v. Stone*, 7 Hill (N. Y.) 128; *Wilson v. Wilson*, 26 Pa. 393.

61 *Campbell v. Pope*, 96 Mo. 468, 473; *First Nat. Bank v. Fricke*, 75 Mo. 178, 183.

CHAPTER XI.

IMPUTATION OF KNOWLEDGE ACQUIRED BY OFFICERS TO THEIR BANK.

- | | |
|---|---|
| 1. What knowledge is imputed. | 8. Imputation in double agency transactions. |
| 2. Distinction between conclusive and disputable presumptions. | 9. Pre-acquired knowledge. Re-organizations. |
| 3. Limitation of presumption when officer is personally interested. | 10. Incidental as distinguished from official knowledge acquired by officers. |
| 4. Knowledge acquired by a director. | 11. Modern rule concerning imputation. |
| 5. Knowledge acquired by managing officer. | 12. The sphere is narrowing. |
| 6. Knowledge acquired by minor officer. | 13. Imputation of knowledge of stockholder. |
| 7. Difficulty in defining the field of duty. | |

1. What Knowledge is Imputed.

The knowledge acquired by a bank officer while discharging his duties concerning the bank's business is often imputed to his bank. The law imposes on him the duty to tell, and presumes he has complied with the law.¹ This is an extension of one of the great principles of agency; whatever the agent has

¹ *Mechanics' Bank v. Schaumberg*, 38 Mo. 228, *Maryland Trust Co. v. National Mech. Bank*, 63 At. (Md.) 70; *Birmingham Trust & Sav. Co., Louisiana Nat. Bank*, 99 Ala. 379; *Everett v. Bank*, 6 Port. (Ala.) 166; *Branch Bank v. Steele*, 10 Ala. 915; *Fall River Union Bank v. Sturtevant*, 12 Cush. (Mass.) 372; *Gaston v. American Ex. Nat. Bank*, 29 N. J. Eq. 98; *Gibson v. National Park Bank*, 98 N. Y. 87; *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Bank v. Davis*, 2 Hill (N. Y.) 451; *Second Nat. Bank v. Howe*, 40 Minn. 390; *Bank of St. Marys v. Mumford*, 6 Ga. 44; *Boggs v. Lancaster Bank*, 7 Watts & Serg. (Pa.) 331; *Bank v. Penland*, 101 Tenn. 445; *Bank of America v. McNeil*, 10 Bush (Ky.) 54; *Duncan v. Jaudon*, 15 Wall. (U. S.) 165.

learned concerning his principal's affairs, the principal himself in due time is supposed to know.

Many difficulties have arisen in applying this principle, and especially to corporations. Moreover, these difficulties are thickening with the growing complexity of business.

Whenever this great rule has been applied, a bank has been regarded as having had actual knowledge of that possessed or acquired by its president or cashier concerning the pledge of its stock;² the trust quality or other peculiarity of stock pledged to the bank;³ the existence of a mortgage or other lien;⁴ the endorsement of notes taken by the bank and character of the endorser;⁵ the non-payment of an obligation held as owner or collector;⁶ the equities between maker and endorser;⁷ the residence of an endorser;⁸ the existence of usury;⁹ of an agreement or modification thereof to which the bank is a party;¹⁰ of letters mailed to, and received by a bank;¹¹ of a legal notice received by or served on the institution.¹² New difficulties have arisen in applying this principle growing out of modern conditions of business.

2 *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank*, 99 Ala. 379; *Bank of America v. McNeil*, 10 Bush (Ky.) 54; *Curtice v. Crawford Co. Bank*, 118 Fed. 390.

3 *Duncan v. Jaudon*, 15 Wall. (U. S.) 165; *Gaston v. American Ex. Bank*, 29 N. J. Eq. 98; *Shaw v. Spencer*, 100 Mass. 382, 389; *Porter v. Bank of Rutland*, 19 Vt. 410.

4 *Trenton Bkg Co. v. Woodruff*, 2 N. J. Eq. 117; *Ottaquechee Sav. Bank v. Truman*, 58 Vt. 166.

5 *Fall River Union Bank v. Sturtevant*, 12 Cush. (Mass.) 372; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151.

6 *Boggs v. Lancaster Bank*, 7 Watts & Serg. (Pa.) 331.

7 *Bank v. Penland*, 101 Tenn. 445; *Second Nat. Bank v. Howe*, 40 Minn. 390.

8 *Central Nat. Bank v. Levin*, 6 Mo. App. 543.

9 *First Nat. Bank v. Ledbetter*, 34 S. W. (Tex. Civ. App.) 1042.

10 *Branch Bank v. Steele*, 10 Ala. 915; *Veasey v. Graham*, 17 Ga. 99; *Stebbins v. Lardner*, 2 S. Dak. 127; *Merchants' Nat. Bank v. McAnulty*, 31 S. W. (Tex. Civ. App.) 1091.

11 *First Nat. Bank v. Fourth Nat. Bank*, 6 C. C. A. 183.

12 *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Bank of St. Marys v. Mumford*, 6 Ga. 44.

2. Distinction Between Conclusive and Disputable Presumptions.

At the outset a distinction and limitation must be noticed. A distinction must be drawn between disputable and conclusive presumptions. In many cases a presumption is conclusive; the principal is presumed to be endowed with the agent's knowledge, and is not permitted to prove the contrary. The fact may be otherwise, but the law will not permit him to set aside the presumption with evidence, however overwhelming it may be. This position is based on the soundest reasons. The rule itself, which has served a great purpose, might thereby be entirely destroyed. Its application to a particular case may work harshly, but if the principal did not know, the law says he ought to have known; that he alone was to blame, either directly or indirectly if he did not, and therefore he, rather than the public, must suffer, as it certainly would by the destruction of the rule.

But like some other rules, it is artificial and there are occasions on which the courts may hesitate to apply it at all, and other occasions on which the presumption, if introduced, may be set aside by real proof.

3. Limitation When Officer is Personally Interested.

The limitation will now be mentioned. The law regards an officer who is personally interested in a transaction as trying to conceal his knowledge from the bank, because his interest will be better served by maintaining silence. This rule applies to other corporations and principals, as well as banks. Their officers and servants are not supposed to tell about matters in which their personal interest draws the other way.¹³

¹³ *Leather Manuf. Bank v. Morgan*, 117 U. S. 96, 112; *Bank of Overton v. Thompson*, 56 C. C. A. 554; *Third Nat. Bank v. Harrison*, 10 Fed. 243; *First Nat. Bank v. Gifford*, 47 Iowa 575; *Wichersham v. Chicago Zinc Co.*, 18 Kan. 481; *Lyne v. Bank*, 5 J. J. Marsh. (Ky.) 545; *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24; *National Bank v. Harris*, 118 Mass. 147; *National Security Bank v. Cushman*, 121 Mass. 490; *Loring v. Brodie*, 134 Mass. 453; *Dillaway v. Butler*, 135 Mass. 479; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332; *Allen v. South Boston R.*, 150 Mass. 200, 206; *Dana v. National Bank*, 132 Mass. 156, 158; *Gallery v. National Ex. Bank*,

To this limitation we think there should be a modification. In the cases in which the agent fully represents the principal, is to all intents and purposes the principal himself in dealing with others, the principal does in truth have knowledge and the presumption ought to accord with the fact. Thus the affairs of a bank are committed to a president or cashier by the deliberate action of the directors. He discounts the paper on his sole responsibility and by the outside world is regarded as having complete control of its affairs. He takes advantage of his situation to discount paper for himself, perhaps on insufficient

41 Mich. 169; Merchants' Nat. Bank v. Lovitt, 114 Mo. 519, 525; Central Bank v. Thayer, 184 Mo. 61; Benton v. Bank, 122 Mo. 332; DeKay v. Hackensack Water Co., 38 N. J. Eq. 158; Camden Safe Dep. Co. v. Lord, 67 N. J. Eq. 489; First Nat. Bank v. Christopher, 40 N. J. Law, 435; In re Plankinton Bank, 87 Wis. 378; Wilson v. Second Nat. Bank, 4 Sad. (Pa.) 68; First National Bank v. Town of New Milford, 36 Conn. 93; Koehler v. Dodge, 31 Neb. 329; Bank v. Sharpe, 40 Neb. 123; Meyers v. Southwestern Nat. Bank, 193 Pa. 1; Hardy v. Chesapeake Bank, 51 Md. 562; First Nat. Bank v. Allen, 100 Ala. 476; DeFeret v. Bank, 23 La. Ann. 310; Weinstein v. National Bank, 69 Tex. 38; Platt v. Birmingham Axle Co., 41 Conn. 255; Winchester & Lemmon v. Balt. & Susq. R., 4 Md. 231; Supreme Tent Knights of Maccabees v. Port Huron Sav. Bank, 100 N. W. (Mich.) 898; State Sav. Bank v. Montgomery, 126 Mich. 327, containing an elaborate discussion and many authorities. This rule will apply to the representations of an officer to a person who has made or endorsed notes that have been discounted by the bank for the officer's benefit. State Sav. Bank v. Montgomery, 126 Mich. 327; Corcoran v. Snow Cattle Co., 151 Mass. 74. See Chap. XII. §14. An officer of a bank who keeps a deposit there as trustee and in drawing it acts ostensibly in that capacity, but really for himself, does not in this transaction bind the bank. Knoblock v. Germania Sav. Bank, 50 S. C. 259. The president and cashier of a bank were also members of a partnership containing one other member. A note was executed and delivered by the president and cashier to the bank in the name of the partnership for their private use. Their knowledge of the transaction was declared to be that of the bank, but the other member of the partnership was not liable thereon. Brobston v. Penniman, 97 Ga. 527. An attorney and president of a corporation knew of a lien on its land purchased by a bank. His knowledge was not imputed to it, though he was a director and member of the loan committee, because of his opposing interest. Wardlaw v. Knoblock Troy Oil Mill, 54 S. E. (S. C.) 658. The knowledge of an agent while engaged in a fraud for his own benefit, in which his principal in no way participates, cannot be imputed to the latter. Knoblock v. Germania Sav. Bank, 50 S. C.

security, and in other ways to serve himself to the manifold detriment of the institution. At length the explosion comes. The bank should not be permitted to shield itself from the consequences of his conduct on the ground of ignorance. Through its manager, whom they put and kept in charge, it did in truth know what he was doing; and surely, with respect to other parties, it ought to be held liable for the consequences of his acts.¹⁴

Suppose he is manager of two concerns and abuses his authority for personal ends, what then? His knowledge ought to be imputed to both, and their liability to be determined accordingly. If he has made, or attempted to make, one responsible to the other its liability should be determined on the presumption that both had knowledge at the time of his conduct. If both did not know, then the recovery, if there could be any, of one from the other would be determined by the usual rules. Would not this modification of the rule aid the cause of justice rather than the application of a presumption that is contrary to the fact?

4. Knowledge Acquired by a Director.

The rules that apply to directors, managing and minor officers all differ. As directors employ only a portion of their time in conducting the affairs of their bank, the rule imputing their knowledge to the institution is narrower than the rule that applies to the managing officers.¹⁵ While knowledge

259. A bank taking an unmatured note signed by the cashier and others as joint makers is not chargeable with knowledge of an agreement between them. *First Nat. Bank v. Foote*, 12 Utah 157. A bank president who induces one to sign a note and borrow from the bank on false representations, for the purpose of serving himself, does not impute his knowledge to the bank of the nature of the loan. As the bank is innocent, having loaned the money, the borrower must repay. *National Bank v. Carper*, 28 Tex. Civ. App. 334.

14 See §7.

15 *Louisiana State Bank v. Senecal*, 13 La. 525; *Fairfield Sav. Bank v. Chase*, 72 Me. 226. When two banks had mutual dealings for two years, knowledge of which the directors could have obtained by examining the books, they must be presumed to have had knowledge of the transaction. *Roberts v. Washington Nat. Bank*, 11 Wash. 550. See cases, ante, notes 2, 3.

which they are especially charged to communicate is imputed to the bank,¹⁶ knowledge obtained in the ordinary way is not imputed unless they were present at a board meeting relating to the matter in question;¹⁷ and not even then unless they informed the board.¹⁸ But knowledge communicated by a director to the board at a regular meeting is imputed to the bank.¹⁹ And also knowledge acquired by him in a special or additional relation as attorney for the institution.²⁰

16 *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394; *Casco Nat. Bank v. Clark*, 139 N. Y. 307; *Merchants Nat. Bank v. Clark*, 139 N. Y. 314; *North River Bank v. Aymar*, 3 Hill 262. In *National Security Bank v. Cushman*, 121 Mass. 490, 491, Morton, J., said: "If the note is discounted by a bank, the mere fact that one of the directors knew the fraud or illegality will not prevent the bank from recovering. *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24; *Commercial Bank v. Cunningham*, 24 Pick. 270; *Housatonic Bank v. Martin*, 1 Met. (Mass.) 294. But if the director who has such knowledge acts for the bank in discounting the note, his act is the act of the bank, and the bank is affected with his knowledge." Knowledge of a defective title to land, acquired by a director in negotiating for its purchase, cannot be imputed to his bank in proceedings against the owner. *Home Sav. & State Bank v. Peoria Ag. Society*, 206 Ill. 1.

17 This rule applies to directors as well as other officers. *First Nat. Bank v. Christopher*, 40 N. J. Law 435; *Mayor v. Tenth Nat. Bank*, 111 N. Y. 446, 457; *Bank v. Davis*, 2 Hill (N. Y.) 451; *People's Bank v. Exchange Bank*, 116 Ga. 820; *Merchants' Nat. Bank v. Demere*, 92 Ga. 735; *English-Am. Loan Co. v. Hiers*, 112 Ga. 823; *Westfield Bank v. Cornen*, 37 N. Y. 320; *Casco Nat. Bank v. Clark*, 139 N. Y. 307; *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314; *Atlantic State Bank v. Savery*, 82 N. Y. 291; *Custer v. Tompkins Co. Bank*, 9 Pa. 27; *Farmers' & Citizens' Bank v. Payne*, 25 Conn. 444; *Farrel Foundry v. Dart*, 26 Conn. 376; *Benton v. German-American Nat. Bank*, 122 Mo. 332, 339; *First Nat. Bank v. Loyhed*, 28 Minn. 396; *Gemmell v. Davis*, 75 Md. 546, 553; *Black v. First Nat. Bank*, 96 Md. 399. A director of a bank signed a bond to secure the performance of a contract of a company to build a mill for a village that issued bonds as a bonus to the company, which were bought by the bank. They were invalid, yet the bank was not regarded as having notice through the director of the fact. *Thompson v. Village of Mecosta*, 141 Mich. 175.

18 *Wilson v. Second Nat. Bank*, 4 Sad. (Pa.) 68.

19 *Bank v. Whitehead*, 10 Watts. (Pa.) 397.

20 *Farrel Foundry v. Dart*, 26 Conn. 576. Or, if the bank take the benefit of any transaction in which he has acted, his knowledge thereof is imputed to the institution. *Smith v. South Royalton Bank*, 32 Vt. 341.

The rule is still stronger against the imputation of his knowledge to the bank when he is directly interested in the matter; for example, in the discount of a note for his own benefit.²¹ On such occasions he is regarded as a stranger to his institution and his knowledge as concealed within himself.

In the case of a joint agency, for example, bank directors' notice to either while thus engaged in conducting the business of the agency is notice to the bank. Thus a bill of exchange was sent to a director to be discounted for the benefit of the drawer. The director received the avails stating they were for his benefit. The bank was chargeable with knowledge of the fraud, and could not recover on the bill. It was his duty to inform the others, and if he did not, surely the bank and not the drawer ought to suffer.²²

21 *English-Am. Loan & Trust Co. v. Hiers*, 112 Ga. 823; *State Sav. Bank v. Montgomery*, 126 Mich. 327, 333; *First Nat. Bank v. Christopher*, 40 N. J. Law 435; *Seneca Co. Bank v. Neass*, 5 Denio (N. Y.) 329, 337; *Third Nat. Bank v. Harrison*, 10 Fed. 243; *Stratton v. Allen*, 16 N. J. Eq. 229; *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33; *Winchester v. Baltimore & Susq. R. Co.*, 4 Md. 231; *In re Marseilles Extension R.*, 7 Ch. App. (Eng.) 161, 170; *In re European Bank*, 5 Ch. App. 358.

22 *Birmingham Sav. & Trust Co. v. Louisiana Nat. Bank*, 99 Ala. 379, 386, and cases cited; *Bank of St. Marys v. Mumford*, 6 Ga. 44; *Bank v. McNeil*, 10 Bush (Ky.) 54; *La. State Bank v. Senecal*, 13 La. 525; *Fall River Union Bank v. Sturtevant*, 12 Cush. (Mass.) 372; *Second Nat. Bank v. Howe*, 40 Minn. 390; *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 228, and cases cited; *Gaston v. American Ex. Nat. Bank*, 29 N. J. Eq. 98; *Bank v. Penland*, 101 Tenn. 445; *Rattelmiller v. Stone*, 28 Wash. 104; *Duncan v. Jaudon*, 15 Wall. (U. S.) 165; *McLeod v. Fourth Nat. Bank*, 20 Fed. 225. Knowledge by the member of a banking firm of the consideration of a certificate of deposit is imputed to the firm, especially when he is the manager. *Niblack v. Cosler*, 26 C. C. A., affg. 74 Fed. 1000. The knowledge of a bank president of a prior pledge concerning the pledgor's title, acquired through the inquiry of the pledgee, is imputed to his bank. *Cur-tice v. Crawford Co. Bank*, 56 C. C. A. 174. A bank is chargeable with knowledge of matters affecting the validity of a note in the original holder's possession acquired by the cashier in discounting it. *National Bank v. Stever*, 169 Pa. 574. A cashier who acts within the scope of his authority in purchasing a certificate of stock, fastens on his bank all the knowledge he possessed of conditions attached to the certificate. *Farmers' & Merch. Bank v. Loyd*, 89 Mo. App. 262; *Stone Cutter Co. v. Meyers*,

5. Knowledge Acquired by Managing Officer.

A more stringent rule applies to the president, cashier or other managing or special officer because he devotes his chief attention to the business of the bank. All the knowledge acquired by him pertaining to its affairs is imputed to the institution.²² Some courts maintain a distinction in imputability founded on an officer's mode of acquisition and his capacity in serving. If he is particularly charged with knowledge, all agree that it is imputed;²³ if acquired incidentally they differ.²⁴ Other courts maintain that knowledge is imputable regardless of the officer's mode of serving. "It is impossible," says the Supreme Court of Minnesota, "to distinguish or discriminate between the information which he possesses, or the acts which he performs as an officer and as an individual, in any matters relating to the business he is controlling."²⁵ This surely is the most practical rule; but does not everywhere prevail.²⁶

A sounder distinction may be drawn between a president

64 Mo. App. 527; *Withers v. Lafayette Co. Bank*, 67 Mo. App. 115; *Lati-mer v. Equitable Loan Assn.*, 78 Mo. App. 463. A bank will not be charged with notice of the insanity of an accommodation endorser on a renewed note, whose condition is known to the president, if at the time of discounting it he was not present at the meeting of the discount committee of which he was a member. *Memphis Nat. Bank v. Sneed*, 35 S. W. (Tenn.) 716; *Snyder v. Lauback*, 7 Pa. Week. Notes 464. See *Lancaster Co. Nat. Bank v. Moore*, 78 Pa. 407.

23 Ibid.

24 Affirmative view. *Cragie v. Hadley*, 99 N. Y. 131; *Holden v. New York & Erie Bank*, 72 N. Y. 286; *Bank v. Davis*, 2 Hill (N. Y.) 451.

Negative view. *People's Bank v. Exchange Bank*, 116 Ga. 820. A bank purchasing a note subject to defences while in the possession of the payee is not bound by the knowledge of them that may come to its officers at a time when they are not engaged in its business, but acting for themselves individually. *Grayson Co. Nat. Bank v. Hall*, 91 S. W. (Tex. Civ. App.) 809, first trial, 81 S. W. 762.

25 *Second Nat. Bank v. Howe*, 40 Minn. 390, 393. For a somewhat opposing view, see *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314 and *Casco Nat. Bank v. Clark*, 139 N. Y. 307; *Curtice v. Crawford Co. Bank*, 56 C. C. A. 174; and especially *People's Bank v. Exchange Bank*, 116 Ga. 820.

26 *Campbell v. First Nat. Bank*, 22 Colo. 177; *Armstrong v. Abbott*, 11 Colo. 220; *Red River Investment Co. v. Smith*, 7 N. Dak. 236; *The Distilled Spirits*, 11 Wall. (U. S.) 356.

who is acting nominally as the head and a real manager. In the former case the rule that applies to directors should be applied to him.

6. Knowledge Acquired by Minor Officer.

A different rule applies to minor officers, tellers and others. The knowledge they acquire pertaining to matters within their narrower sphere are imputed to the bank, but not knowledge of other things.²⁷ Thus a receiving teller is not obliged to report the information he may have learned concerning a note in the bank's possession because he has nothing to do with it, while it is his duty to report any unusual information he may have received concerning a check received for deposit.²⁸ Likewise the knowledge acquired by a messenger, who has been sent to collect a draft of a partnership, that it has dissolved, is not to be imputed to the bank. In a case involving this principle the court declared that the partner who informed the messenger of the dissolution "acted at his peril in assuming that what he told [him] would be actually communicated to the bank."²⁹

7. Difficulty in Defining the Field of Duty.

The boundary of an officer's official field joins imperceptibly the larger field lying beyond; and in some cases the knowledge acquired is very near the dividing line. In the numberless acts of men, many must have occurred on the boundary; and whether the knowledge thus acquired is to be imputed must be the subject of a judicial determination. The rule is clear enough, the difficulty is in its application. Nor can this be removed without establishing a rule so radical as to do greater wrong in other ways.

There is a limitation to this principle. If a bank officer who

²⁷ See Chap. X. §14.

²⁸ *Goodloe v. Godley*, 13 Sm. & M. (Miss.) 233. See also *Second Nat. Bank v. Howe*, 40 Minn. 390, 393. A notice to the teller of a banking house of the dissolution of an indebted firm was not notice to the bank without proof that it was within the scope of his duties to communicate the knowledge. *Marsh v. Wheeler*, 77 Conn. 449.

²⁹ *Camp v. Southern Bkg. & Trust Co.*, 97 Ga. 582, 585.

is thus acting as a double agent abuses his agency by making use of his outside principal's funds to aid the bank, it is charged with knowledge of his conduct and is responsible. Thus a cashier who was an assignee of an estate, diverted its resources to the bank for the purpose of covering up irregularities. The bank was charged with knowledge and obliged to refund.³⁰

8. Imputation in Double Agency Transactions.

When a bank officer is acting as an agent of another corporation, or of an individual, is his knowledge while thus acting for another to be imputed to his bank? Sometimes the question has been answered in the affirmative,³¹ but more generally the other way.³² To become binding the knowledge must have been actually imparted to some other officer possessing authority to receive and act upon it.³³

Again, though two corporations have the same managing officer, and common transactions, his knowledge will not be

30 *Wiggins v. Stevens*, 33 N. Y. App. Div. 83 and cases cited.

31 The knowledge of a cashier, who is also the agent of a third party, concerning any transaction, is imputed to the bank. *Leonard v. Latimer*, 67 Mo. App. 138; *Citizens' Sav. Bank v. Walden*, 21 Ky. L. Rep. 739.

32 See Chap. XII. §14. *DeKay v. Hackensack Water Co.*, 38 N. J. Eq. 158; *Camden Safe Dep. Co. v. Lord*, 58 At. (N. J.) 607; *Wilson v. Second Nat. Bank*, 4 Sad. (Pa.) 68; *Holden v. New York & Erie Bank*, 72 N. Y. 286; *Merchants' Nat. Bank v. Tracy*, 77 Hun (N. Y.) 443; *Stockdale v. Keyes*, 79 Pa. 251; *First Nat. Bank v. Loyhed*, 28 Minn. 396. The treasurer of a brewing company, who was also treasurer of a trust company, opened an account with the latter and afterward appropriated the money. The trust company, no fraud appearing on its part, was not liable for the misappropriation. *Elk Brewing Co. v. Neubert*, 213 Pa. 171. Nor did the fact, that the treasurer of the brewing company was also the president and director of the other, impute his knowledge of his wrong doings to the latter. *Ibid.* A bank cashier sold cattle, in which he and A were interested, receiving payment in a draft and credit slip payable to the bank, which he deposited to his own credit. Afterward he collected the amount and converted it to his own use. No one in the bank had any knowledge of A's interest. The bank was held to be not chargeable with any knowledge of A's interest in the fund deposited and occupied no trust relation toward him rendering it accountable to him for any portion of the deposit. *Bank of Overton v. Thompson*, 56 C. C. A. 554.

33 *Wilson v. Second Nat. Bank*, 4 Sad. (Pa.) 568.

attributed to either in matters wherein he did not represent them.³⁴ Lastly, though he might have knowledge important to both, the rule should not always be pressed that the knowledge is communicated alike to both.³⁵ But it can be in a matter between either company and one of its customers.³⁶

The doctrine of imputation, while resting on rational foundations in most cases, cannot be applied in some double agency transactions without working injustice. These, therefore, must be decided by the application of other principles. And this is what the court did in the Gunster case, one of the most instructive of all the recent cases.

The treasurer of a manufacturing company was vice-president and manager of a bank. As treasurer, he made two company notes and signed them with his name as treasurer. They were discounted by the bank and the proceeds were credited to

34 A bank that purchases a note of a corporation whose president is cashier of the bank is not charged with knowledge of any information, since the cashier in thus acting does not represent the bank. *People's Sav. Bank v. Hine*, 131 Mich. 181; *State Sav. Bank v. Montgomery*, 126 Mich. 327. The president of a corporation for which the bank discounted paper was vice-president of the bank; the secretary was also a director of the bank. The bank was nevertheless not charged with infirmities in paper presented by the corporation as neither of these officers represented the bank in the transaction. *Holm v. Atlas Nat. Bank*, 28 C. C. A. (U. S.) 297; *First trial*, 19 C. C. A. 94; *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33; *First Nat. Bank v. Christopher*, 40 N. J. Law 435. "Notice to the president of one corporation can not be notice to another corporation of which he happens to be president where the dealing is had between the two corporations, each acting in its own interest. In such cases the knowledge of the common officer is not imputable to either corporation unless acquired by him as an officer of such corporation." *Rombauer, P. J.*, *Central Nat. Bank v. Pipkin*, 66 Mo. App. 592, 598, citing *Merchants' Nat. Bank v. Lovitt*, 114 Mo. 519; *Benton v. German Am. Nat. Bank*, 122 Mo. 332. In *First Nat. Bank v. Town of New Milford*, 36 Conn. 93, the agent was thus acting as head of the bank, but not of the town, and the other town officers knew nothing about his wrongful conduct.

35 *Germania Trust Co. v. Driskill*, 23 Ky. L. Rep. 2050, 2052.

36 *Germania Trust Co. v. Driskill*, 23 Ky. L. Rep. 2050; *Kissam v. Anderson*, 145 U. S. 435, 443; *Merchants' Nat. Bank v. State Bank*, 10 Wall. (U. S.) 604.

the company. He then drew a check "to the order of Dft. N. Y.," again signing the company's name and his own as treasurer. The amount of the check was charged to the company on the bank books, and in payment of the check he drew two drafts on New York to his own order and signed them as vice-president of the bank and endorsed them personally. He received the money and used it himself. The bank sued the company for the amount of the notes; and the court held that as these were made by the treasurer, and also the check drawn for the proceeds, and that both acts were within his authority as treasurer, the company was liable therefor. Says Justice Mitchell: "Both might by mere inference be charged with knowledge, as the fraud was committed by an agent with authority to act for both; but in fact neither had, or in the nature of things could have had, any knowledge at all. Both acts were within his authority as treasurer and would have been lawful if they had been honest, but he drew the money on drafts which were the money of the company, and when he embezzled the money it was the money of the company. The bank had no part in his act and gained nothing by it. The fraud had its inception and its consummation in acts done in his capacity of treasurer of the defendant company, and it should bear the loss."³⁷

In not imputing the knowledge of the agent to his principal in transactions between them, the application of the rule is justly withheld to protect the principal. But when the agent represents another principal beside the bank, it is often needful in the interest of justice to impute his knowledge to the bank to protect the other principal, who, as between the two principals, merits prior consideration.

9. Pre-acquired Knowledge. Reorganization.

Concerning knowledge acquired before establishing an official relation with a bank, the judicial world is divided between two opinions. One opinion is founded on the answer to a ques-

37 *Gunster v. Scranton Heat & Power Co.*, 181 Pa. 327.

tion of fact, was the knowledge thus acquired retained after the learner established his official relation with the bank? If it was, then the bank is bound by the information,³⁸ otherwise it is not.³⁹ The other opinion, not regarding with favor this preliminary, declares that in no case of this kind is the bank bound.⁴⁰

Ordinarily, knowledge acquired in advance of establishing an official relation is not likely to be remembered, for there is no object in retaining it; on the other hand, the knowledge may have been gained so shortly before, or may have made such a strong impression on the hearer, that in truth it was remembered.⁴¹ When inquiry yields this fact, why should not imputation follow?

How far is knowledge imputed to a reorganized corporation having the same officers? One of these reorganizations, which continued the same individuals in office, had notes discounted for the purpose of raising money to pay its indebtedness. It was held that the bank which discounted them, whose president was also a director of the old and new corporations, knew what had been done.⁴²

38 *Red River Investment Co. v. Smith*, 7 N. Dak. 236; *National Security Bank v. Cushman*, 121 Mass. 490; *Fairfield Sav. Bank v. Chase*, 72 Me. 226; *Hart v. Farmers' & Mech. Bank*, 33 Vt. 252, 270; *Smith v. South Royalton Bank*, 32 Vt. 341; *Hayward v. National Ins. Co.*, 52 Mo. 181; *Bank v. Craig*, 6 Leigh (Va.) 399; *Campbell v. First Nat. Bank*, 22 Colo. 177; *Distilled Spirits*, 11 Wall. (U. S.) 356.

39 *Ibid.*

40 *Houseman v. Girard B. & L. Assn.*, 81 Pa. 256.

41 A bank is bound by knowledge of an officer acquired so near the time of the transaction that he must have recollected it. *Louisville Trust Co. v. Louisville R.*, 22 C. C. A. 378. The wilful character of the misapplication of a fund is not imputed to the bank by the subsequent knowledge of the other officers. *Rieger v. United States*, 47 C. C. A. 61. Whether the knowledge of a prior transaction by a bank officer of the same nature as the second was so near that it must have been present in his mind and thus imputable to the bank depends "upon the lapse of time and other circumstances." *Christie v. Sherwood*, 113 Cal. 526; *Yerger v. Barz*, 56 Iowa 77; *Distilled Spirits*, 11 Wall. (U. S.) 356, 366.

42 *Union Bank v. Wando Mining Co.*, 17 S. C. 339, 345.

10. Incidental as Distinguished from Official Knowledge Acquired by Officers.

Another line is drawn between knowledge acquired by an officer in an incidental and official way. Incidental knowledge cannot be imputed to the bank. Says Justice Gray, speaking for the New York Court of Appeals:⁴³ "An officer's knowledge, derived as an individual, and not while acting officially for the bank, cannot operate to the prejudice of the latter." On many occasions directors hear something not favorable to the credit or character of persons whose names appear on paper which is presented to the bank for discount. Such knowledge is not imputed to the bank, especially when the director was not present at the time of discounting the paper; nor would the bank be bound ordinarily if he were present. To bind the bank by such knowledge the director must be especially charged therewith; but when he is, the knowledge is imputed to his bank whether it is actually given or not. The effect of withholding it is the same whether through design or forgetfulness.⁴⁴

11. Modern Rule Concerning Imputation.

The following rule may stand as a modern statement of the law. When a director or other officer has knowledge of material facts respecting a proposed transaction, which as the representative of the bank it is his official duty to communicate to the directors, trustees or other officers, he will be presumed to have done so, and his bank will be thereby bound.⁴⁵ In a well-

43 *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 313; *Westfield Bank v. Cornen*, 37 N. Y. 320; *Bank v. Davis*, 2 Hill (N. Y.) 451; *North River Bank v. Aymar*, 3 Hill 262; *Fulton Bank v. New York & Sharon Canal Co.*, 4 Paige (N. Y.) 127; *Farmers & Citizens' Bank v. Payne*, 25 Conn. 444; *Farrel Foundry v. Dart*, 26 Conn. 376; *Louisiana State Bank v. Senecal*, 13 La. 525; *Housatonic Bank v. Martin*, 1 Met. (Mass.) 294; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228, 244; *Benton v. German American Nat. Bank*, 122 Mo. 332, 144 Mo. 519; *Kearney Bank v. Froman*, 129 Mo. 427.

44 *National Bank v. Norton*, 1 Hill (N. Y.) 572, 575; *Fulton Bank v. New York & Sharon Canal Co.*, 4 Paige (N. Y.) 127; *U. S. Ins. Co. v. Shriver*, 3 Md. Ch. Dec. 381, 384. But see *Custer v. Tompkins Co. Bank*, 9 Pa. 27, and *Bank v. Whitehead*, 10 Watts (Pa.) 397.

45 *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 313; *Smith v. South Royalton Bank*, 32 Vt. 341; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228.

considered case Justice Holmes thus stated the rule. "The knowledge acquired by the president, directors, cashier and tellers whilst engaged in the business of the bank in their official capacities, will be notice to the bank. So far as either has authority to act for the bank, his acts are the acts of the bank; but mere private information obtained beyond the range of his official functions will not be deemed notice to the bank."⁴⁶

12. The Sphere is Narrowing.

The sphere of imputed knowledge is narrowing. We have seen that it excludes personal and double agency transactions, knowledge actually acquired before, and incidentally after, assuming office; the only clear field left is knowledge acquired in the course of official work, which it is his plain duty to communicate.

A bank that has been once charged with knowledge continues to be whatever changes may occur in the personnel of its working force.⁴⁷

13. Imputation of Knowledge of Stockholder.

Generally, and for most purposes, a corporation is a legal entity distinct from the body of its stockholders; and, in any event, to render the knowledge of the individual incorporators, the knowledge of the incorporation, it must be the knowledge of all the corporators.⁴⁸ Therefore the knowledge acquired by a single stockholder cannot be imputed to the bank.⁴⁹

⁴⁶ *Mechanics' Bank v. Schaumburg*, 38 Mo. 228, 244; *Bank v. Davis*, 2 Hill (N. Y.) 451; *Campbell v. First Nat. Bank*, 22 Colo. 177. See *Red River Investment Co. v. Smith*, 7 N. Dak. 236. In a recent case the Supreme Court of Missouri said: "The law is well settled in this state that knowledge which comes to an officer of a corporation through his private transactions, and beyond the range of his official duties, is not notice to the corporation. This is the rule though the officer obtaining the knowledge was, at the time, the managing agent of the corporation." *Kearney Bank v. Froman*, 129 Mo. 427, 430, citing *Benton v. German-American Nat. Bank*, 122 Mo. 332, 339; *Johnston v. Shortridge*, 93 Mo. 227; *Merchants' Nat. Bank v. Lovitt*, 114 Mo. 519.

⁴⁷ *U. S. Nat. Bank v. Forstedt*, 64 Neb. 855.

⁴⁸ *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 65.

⁴⁹ *Housatonic Bank v. Martin*, 1 Met. (Mass.) 294.

CHAPTER XII.

PERSONAL AND DOUBLE AGENCY TRANSACTIONS.

1. A bank is not responsible for the individual act of an officer.
2. When does he act for the bank?
3. When does he not thus act?
4. When parol evidence may be admitted to solve the doubt.
5. Thefts.
6. Contract between bank and officer.
7. Cannot lend to himself without clear authority.
8. Cannot endorse himself without clear authority.
9. A bank may authorize him to lend to himself.
10. An individual must assure himself of officer's authority.
11. Where is the safe line?
12. Sale of paper by an officer of the bank.
13. Liability of officer in his own transactions with his bank.
14. Liability of a bank for officer as agent for others.
 - a. Cases classified.
 - b. Rule of imputation when double agent manages and controls the bank.
 - c. Rule not always followed, perhaps not understood.
 - d. Rule of imputation when double agent controls both principals.
- e. Rule of imputation when double agent also has an additional personal interest.
 1. Personal interest is assumed to outweigh interest as agent.
 2. This assumption should not overcome real truth.
 3. His knowledge may be imputed to the bank or company he controls, and not the one of which he is simply co-officer.
15. His authority as agent to borrow money, etc.
16. Bank officer's authority as agent ceases on principal's insolvency.
17. Two banks having same directors may make contracts.
18. Fraudulent contracts may be set aside.
19. Non-imputation of officer's knowledge does not apply in such cases.
20. Liability of bank with discount and savings bank department.

1. A Bank is Not Responsible for the Individual Act of an Officer.

The line between official and individual action cannot always be easily defined.¹ Of course, a bank is not responsible for the act of an officer, though done within the bank, who is acting for himself,² or as agent for another.³ "So long as a person deals with the cashier in a matter wherein, as between himself and the cashier he is dealing with, or has the right to believe he is dealing with, the bank, the transaction is obligatory upon the bank. The test of the transaction is whether it is with the bank and its business, or with the cashier personally and in his business."⁴

So long as bank officers refrained from transacting personal business with their own bank, as they did for many years, few cases of this nature arose; but since opening the way to them to deposit with, and borrow from their banks, and engage in many other transactions, the difficulties between banks and their officers have rapidly multiplied.

2. When Does He Act for the Bank?

This inquiry then becomes one chiefly of fact. Let us first state some of the questionable occasions on which an officer has acted for his bank. One of these was in receiving deposits from a person who supposed that he was putting the money into the bank, though receiving a certificate signed with the in-

1 Chap. IX. §14. A deed executed by a bank through its cashier to himself is a nullity without proof of express authority. *Northwestern Fire Ins. Co. v. Lough*, 102 N. W. 160.

2 *State Sav. Bank v. Montgomery*, 126 Mich. 327, 332; *Jones v. First Nat. Bank*, 3 Neb. (Unof.) 73; *City Electric R. v. First Nat. Bank*, 65 Ark. 543; *Ellis v. First Nat. Bank*, 22 R. I. 565; *Burris v. Bank*, 70 Mo. App. 675.

3 *Manhattan Co. v. Lydig*, 4 Johns. (N. Y.) 377; *School District v. De Weese*, 100 Fed. 705. Authority will not be implied to an officer or agent to represent it in dealing with another company which he also represents. *Mercantile Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408. See *Alexander v. Relfe*, 74 Mo. 495. A bank creditor of an estate and largely interested therein may contract either expressly or impliedly to pay one of its officers for serving as administrator. *Lowe v. Ring*, 106 Wis. 647.

4 *Campbell v. Manufacturers' Nat. Bank*, 67 N. J. Law 301, 303.

dividual name of the president.⁵ Another occasion was the discount of a note by a bank given by its president and endorsed by the bank.⁶ Another case, quite similar, was in giving securities to a bank president for exchange during banking hours and receiving his individual receipt on a printed caption containing the bank's name.⁷ To these may be added cases of in-

5 *West v. First Nat. Bank*, 20 Hun (N. Y.) 408; *Coleman v. First Nat. Bank*, 53 N. Y. 388, 394; *Steckel v. First Nat. Bank*, 93 Pa. 376; *Zeigler v. First Nat. Bank*, 93 Pa. 397; *Patterson v. First Nat. Bank*, 102 N. W. (Neb.) 765; *Bickley v. Commercial Bank*, 43 S. C. 528, see this case also for an answer to the question, what evidence may be introduced to prove an officer's agency. A depositor asked the president what interest he would pay for a deposit on time. He replied, "The bank is paying three per cent., but since you have come up here so far, I will pay you four." The president gave him a check for the amount payable at the bank in six months, with interest at four per cent., and signed by him in his individual capacity. The bank was held for the amount. *First Nat. Bank v. Heim*, 107 N. W. (Neb.) 1019. The debtor of a mortgage, given to a bank for collection, made a draft in payment payable to the president of the bank followed by the abbreviation, "Pt.," and enclosed it with a letter stating that it was to pay the debt. The president acknowledged its receipt by a letter signed by his name, with the addition, Pres. This was shown by evidence to mean president. The bank was deemed to be the agent and responsible for the misapplication of the money. *Griffin v. Erskine*, 107 N. W. (Iowa) 13. A depositor who wished to put a portion of his deposit in another bank gave an order for the amount to the cashier, who agreed to make the transfer. Instead of doing so, he transferred the amount to himself. In an action by the depositor against the bank it defended on the ground that the cashier was acting for him. But the court declared that the bank was the depositor's debtor and could not "be permitted to cancel the obligation through the fraud of its officer acting within the scope of his apparent duty and according to the general course of business." *Goshorn v. People's Nat. Bank*, 32 Ind. App. 428. A cashier who, on purchasing property from a debtor, agrees to apply the money on his indebtedness to the bank, acts in his official capacity in making the agreement. *Pease v. Francis*, 55 At. (R. I.) 686.

6 *Central Trust Co. v. Cook Co. Nat. Bank*, 15 Fed. 885. A note executed by a third person was discounted by B bank on the request of the president of A bank, who endorsed the note. The proceeds were credited to the bank on account of the makers of the note, who were indebted thereto, and insolvent. The president of A bank was regarded as acting individually in the matter, and his bank therefore could not be held as having practiced a fraud on the lending bank. *American Nat. Bank v. Warren Deposit Bank*, 92 S. W. (Ky.) 585.

7 *Van Leuven v. First Nat. Bank*, 54 N. Y. 671. See Justice Allen's

vestments made by the manager for the bank's customers.⁸ More generally, persons who transact business with bank officers within their bank suppose they are acting officially.⁹ Another series of cases may be mentioned in which the trustees or directors of an institution leave its management to one or more officers, who take the securities and other property in the bank and use the same in their private business.¹⁰

Again, an officer is acting for his bank in receiving money for a note left for collection;¹¹ or money to pay a note;¹² or for an investment;¹³ or stock for sale.¹⁴

Stock transferred to A as president of a bank is a transfer to the bank;¹⁵ and a note payable in bank stock which is transferred to the president is held for the bank.¹⁶ Likewise a promise to a cashier or other officer of a particular bank, is in law a promise to the institution;¹⁷ and a deed of land to the

remark on this case in *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y., p. 293.

8 *Carr v. National Bank*, 167 N. Y. 375; *Bobb v. Savings Bank*, 23 Ky. L. Rep. 817; *Caldwell v. Nat. Mohawk Valley Bank*, 64 Barb. (N. Y.) 333. A cashier who buys stock for a man, who sends his check to the cashier individually, of which no bank record appears, is a transaction solely between the customer and cashier, and the bank is not liable for the latter's conduct. *Preston v. Marquette Co. Sav. Bank*, 81 N. W. (Mich.) 920. A bank customer employed its cashier to purchase bonds for him which were kept as a special deposit in the bank. Afterward the cashier transferred them to the bank to conceal his own fraud. In the latter act he was regarded as acting for the bank, and rendered it responsible for his deed. *First Nat. Bank v. Dunbar*, 118 Ill. 625.

9 *Thompson v. Bell*, 26 Eng. L. & Eq. 536; *Caldwell v. Nat. Mohawk Valley Bank*, 64 Barb. (N. Y.) 333.

10 *Cutting v. Marlor*, 78 N. Y. 454.

11 *Town of Concord v. Concord Bank*, 16 N. H. 26.

12 *Smith v. Essex Co. Bank*, 22 Barb. (N. Y.) 627.

13 *Caldwell v. National Mohawk Valley Bank*, 64 Barb. (N. Y.) 333.

14 *Williamson v. Mason*, 12 Hun (N. Y.) 97.

15 *Leavitt v. Fisher*, 4 Duer (N. Y.) 1.

16 *Markley v. Rhoads*, 59 Iowa 57.

17 *Baldwin v. Bank*, 1 Wall. (U. S.) 234. A bond that is to be paid to the directors of a bank, their successors and assignees, is a bond to the bank and it can sue thereon. *Bayley v. Onondaga Co. Ins. Co.*, 6 Hill (N. Y.) 476.

president in trust in payment of a debt due to the bank is a deed to the bank itself, and his heirs can be compelled to make a proper transfer;¹⁸ a certificate of deposit signed by the cashier individually is that of the bank;¹⁹ also a note drawn payable to a cashier is payable to the bank;²⁰ likewise a bill of exchange;²¹ a check;²² or stock transferred as security for a loan.²³ For the same reason, a bank whose president or other officer has acted for the institution in making collections for a customer, which have been received and used like other funds, cannot, in order to escape responsibility for them, maintain that the officer did not act for the bank in making them.²⁴

3. When Does He Not Thus Act?

On the other hand, a bookkeeper who receives the money of a customer for deposit, and enters the amount in the customer's pass-book and also in the bank ledger, but not in the cash-book, is not acting in such a transaction for the bank, consequently it is not bound by his act.²⁵ Likewise a paying teller who receives money from a stranger to apply on a bill or note payable there, acts as the stranger's agent, consequently the bank is not liable for his conduct,²⁶ and certainly not for

18 *Moore v. Munn*, 69 Ill. 591. But in *Greenfield v. Scott*, 122 Ga. 303, a deed to "E. H. P., Vice-president of the National Bank of the Republic," was held to convey the title to him individually.

19 *Crystal Plate Glass Co. v. First Nat. Bank*, 6 Mont. 303.

20 *Blair v. First Nat. Bank*, 2 Flippin (U. S.) 111; *Commercial Bank v. French*, 21 Pick. (Mass.) 486; *Fairfield v. Adams*, 16 Pick. 381.

21 *Barney v. Newcomb*, 9 Cush. (Mass.) 46.

22 *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. (U. S.) 326, 336.

23 *Stamford Bank v. Ferris*, 17 Conn. 259.

24 *Citizens' Bank v. Fromholz*, 64 Neb. 284.

25 *Manhattan Co. v. Lydig*, 4 Johns. (N. Y.) 377. In one of the cases a person threw down a roll of bills on a bank counter and the cashier asked him if he wished a bank book or certificate of deposit. He answered, "No, no, do you take it and keep it till I call for it." The cashier credited the person on the bank books with the amount. The court decided that this was a mistake and that the person intended to leave the money with the cashier personally. *Boston & Maine R. v. Oliver*, 32 N. H. 172. A cashier who by agreement keeps the books of a person and receives and disburses his funds is his agent. *Demarest v. Holdeman*, 34 Ind. App. 685.

26 *Thatcher v. Bank*, 5 Sand. (N. Y.) 121.

that of an officer who receives money as a personal loan.²⁷ But a paying teller who, during the absence of the receiving teller, receives a post-dated check after business hours and promises to pay it when due, acts for the bank, which is liable for his neglect to pay at the proper time.²⁸

4. When Parol Evidence May be Admitted to Solve the Doubt.

In all cases, therefore, of doubt, whether the president, cashier or other officer has acted in a private or official capacity, parol evidence may be admitted to show the truth.²⁹

5. Thefts.

Thefts also are of this personal nature, consequently a bank is not responsible for them, unless they were committed by a suspected officer.³⁰ A bank rarely employs an officer of this type. He is employed to keep, not to abstract; and the occasions are few indeed in which banks have knowingly retained suspected officials.

6. Contract Between Bank and Officer.

Having disposed of these matters, we will next consider those between a bank officer and his bank. For many years the courts gave no countenance to them, but the modern de-

²⁷ *Moore v. Citizens' Nat. Bank*, 111 U. S. 156. In *New England Marine Ins. Co. v. Chandler*, 16 Mass. 274, 277, the cashier who took stock as collateral security promising to pay over the surplus to the borrower, was held to be his trustee.

²⁸ *Second Nat. Bank v. Averell*, 2 App. Cases (D. C.) 470.

²⁹ *Bickley v. Commercial Bank*, 43 S. C. 528; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. (U. S.) 326. In *First Nat. Bank v. Arnold*, 156 Ind. 487, the vice president made a loan, giving a note signed by himself and another director and endorsed by the cashier, for the bank. The loan was, in truth, not procured for the bank, yet it was held liable. A statement of the president of the borrowing bank to the cashier of the lender, that the loan was for the bank, was admissible. In *First Nat. Bank v. Anderson*, 82 S. W. (Indian Terr.) 693, the cashier used A's deposit to take up a note held by the bank, and endorsed it to her. In so doing the bank claimed that he acted as her agent. The court held that the question was one of fact to be ascertained by the jury.

³⁰ *Scott v. National Bank*, 72 Pa. 471; *Foster v. Essex Bank*, 17 Mass. 479.

mands of society have resulted in extensive modifications of the law. But it is a dangerous innovation, and the way must be kept open for watching every transaction of the kind and correcting every abuse. An officer, therefore, who engages in litigation in which his individual interests are opposed to those of his bank cannot bind his bank conclusively by them; nor need actual fraud be shown in order to avoid them.³¹ In another chapter we have shown the limitations under which directors may contract with their bank; the limitations that apply to other officers will now be considered.

In the earlier days a bank officer did not keep a deposit with his own bank, because it was not thought to be proper for him to have any dealings with his bank. Behold the wide departure and the grave legal complications attending the change!

7. Cannot Lend to Himself Without Clear Authority.

Let us begin with his authority to lend the bank's money to himself. Though possessing general authority to discount for the bank, this does not authorize him to discount notes to which he is a party. This limitation is absolutely necessary for its protection.³² In some states a statutory barrier has been raised.³³

³¹ *Gund v. Ballard*, 103 N. W. (Neb.) 309.

³² See §15. *Bank v. Dooly*, 113 Wis. 590; *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737; *First Nat. Bank v. Gifford*, 47 Iowa 575; *Rhodes v. Webb*, 24 Minn. 292; *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24; *Lee v. Smith*, 84 Mo. 304; *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557. See *Seneca Co. Bank v. Neass*, 5 Denio (N. Y.) 329. Drafts drawn in grain and other speculations to the order of the cashier by the cashier himself or his assistant, on his bank are sufficient to put the broker who is conducting the business on inquiry concerning the nature and ownership of the funds sent to him. *Mendel v. Boyd*, 3 Neb. (Unof.) 473. And he will be held liable to the true owner of the funds even though he has no knowledge of their ownership. *Ibid.* *Central Stock & Grain Exchange v. Bendinger*, 48 C. C. A. 726.

³³ Iowa, Acts of 15th Gen. Assembly, Sec. 17, Ch. 60. In California by the Civil Code, Sec. 2230, providing that no trustee or his agent may take part in any transaction concerning the trust in which he or his agent has an interest adverse to the beneficiary, the president of a corporation is prohibited from purchasing notes payable to the corporation and endorsing

8. Cannot Endorse Himself Without Clear Authority.

An officer can convey, by his endorsement, the legal title to paper to anyone except himself.³⁴ And an endorsement to himself, though voidable at the instance of the bank, would be valid until it was avoided.³⁵

Again, the obligation given by an officer individually, or as an officer of another company, which he endorses or guarantees for his bank and transfers to another party, is nevertheless binding on his own bank whenever it accepts and retains the money,³⁶ but not otherwise.³⁷ The bank is bound, even though such a contract would transcend its own authority, not strictly on the ground of ratification, but rather, having had the benefit of the act it must respond therefor.³⁸

9. A Bank May Authorize Him to Lend to Himself.

A bank may authorize its president or other officer to use its funds for his individual purpose.³⁹ This is extending his authority to the farthest limits of prudence; indeed, a bank can hardly go farther. It is proper, therefore, should a bank extend its authority so far, to hold it responsible for his abuse of authority. As some one must suffer from its abuse, the bank which granted it should be the victim rather than an individual whom he has misled. In Campbell's case the court remarked

them to himself individually. Nor will any inquiry be permitted into the question of the honesty or fairness of a transaction whereby the president of a corporation purchases notes payable to the corporation and endorses them to himself. *Smith v. Pacific Works*, 78 Pac. 550.

34 *Dyer v. Sebrell*, 135 Cal. 597; *Preston v. Cutter*, 64 N. H. 461.

35 *Ibid*; *Union Pacific R. v. Credit Mobilier*, 135 Mass. 367, 376, 377.

36 *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737; *Hawkins v. Fourth Nat. Bank*, 150 Ind. 117; *People's Bank v. Manuf. Nat. Bank*, 101 U. S. 181, 183.

37 *Ibid*.

38 Ch. IX. §33.

39 *Gale v. Chase Nat. Bank*, 43 C. C. A. 496. In *Bank v. American Dock & Trust Co.*, 143 N. Y. 559, 564, the court said: "If such a power is intended to be given it must be expressed in language so plain that no other interpretation can rationally be given it, for it is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time."

that if a bank gives its cashier "authority to draw drafts for his own account on its funds, or ratifies his acts in known transactions which he openly conducts, honestly or dishonestly, it will not be permitted to say that a similar transaction which he secretly and by concealment conducts does not bind it."⁴⁰

10. An Individual Must Assure Himself of Officer's Authority.

On the other hand, to grant so much authority to an officer on any occasion is a grave matter, and any one doing business with him is bound to assure himself that he is acting rightly. A customer who asks the manager to discount a piece of paper that he presents, expecting to repay the money on the maturity of the obligation, has, or should have, a very different feeling concerning the propriety of the proceeding than his discount of a piece of paper made or endorsed by the president, coupled with his own name as maker or endorser, the avails of which the president is to take. No inquiry of the directors to make the first loan is required, because such action is everywhere known; while inquiry is needed in the other. Therefore, a creditor who receives a draft purporting to be that of the bank, drawn by its president, and sent by him in discharge of his debt, must inquire of the directors whether he had authority to use the bank's funds in this manner before he can rightfully retain them.⁴¹

Such super-authority may indeed be given; and when it is the bank is as clearly liable as in other cases. Thus a bank may give an officer authority to certify his own check, discount his own note, and do many other things beyond the usual authority granted to him.⁴²

⁴⁰ 67 N. J. Law 301, 306.

⁴¹ *Lamson v. Beard*, 36 C. C. A. 56. See *Anderson v. Kissam*, 35 Fed. 699; *Campbell v. Manufacturers' Nat. Bank*, 67 N. J. Law 301; *Bank v. American Dock & Trust Co.*, 143 N. Y. 559; *Bank v. N. Y. & Lake Erie R.*, 106 N. Y. 195; *Hanover Nat. Bank v. American Dock & Trust Co.*, 148 N. Y. 612; *Corn Ex. Bank v. American Dock & Trust Co.*, 149 N. Y. 174; *Gale v. Chase Nat. Bank*, 43 C. C. A. 496.

⁴² *Goshen Nat. Bank v. State*, 141 N. Y. 379; *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556 and cases cited in note 1.

11. Where is the Safe Line?

One may inquire, where is the line within which one may safely transact business with a bank's officer without making any special inquiry into his authority; beyond which one cannot transact business except at a special hazard? Is that line shadowy and changing, or is it permanent and easily defined? By endowing bank officers to do so much business for themselves, acting as both contracting parties, the line is becoming more and more difficult to define. This much, though, may be said in the way of evolving practical working principles; First, that every contract of an officer in which he is a contracting party, or is to be benefited thereby unless the bank is properly represented by directors or other officers who can adequately care for its interests, is regarded with some suspicion—enough to require the other persons interested therein to inquire into the contracting officer's authority, and if they do not, they, rather than the bank, must suffer the ill consequences, if any arise, from the transaction.

Second, when the business of a bank is wholly given up by the directors to one or more officers, which is generally done either by resolution of the directors, or by such action on the part of its officers that those who do business with them are justified in believing they are in possession of full authority, they may accordingly act in safety.⁴³

43 *Armstrong v. Cache Valley Land Co.*, 14 Utah 450; *G. V. B. Mining Co. v. First Nat. Bank*, 35 C. C. A. 510, and cases cited. To prevent the loss of a debt to the bank, the president at the debtor's request, purchased the property at a foreclosure sale, paying therefor with his own check. The amount was charged to the bank, which afterward obtained a loan thereon. It received the rent and paid the insurance and interest on the mortgage. After the mortgage was foreclosed the property did not sell for enough to pay it. The bank tried to escape and contended that the president acted for himself and not for the bank in the transaction, but failed in its contention. *Brown v. Mechanics & Traders' Nat. Bank*, 12 N. Y. Supp. 861. The president of a bank procured from another the discount of two notes that were forgeries; and also a third note, signed apparently by him, but without authority. To secure them he gave collaterals belonging to the bank and personally used the proceeds. Nevertheless the defrauded bank could not recover the securities of the other

12. Sale of Paper by an Officer of the Bank.

A bank officer who sells his bank paper without making a proper disclosure of his knowledge concerning the parties thereto is liable to the bank therefor. As soon as the truth is learned the directors may rescind the purchase and recover the money.⁴⁴

13. Liability of Officer in His Own Transactions With His Bank.

In transactions between the bank and an officer there has not been much difficulty in applying the rule of imputability of his knowledge concerning them to the bank. In a luminous decision on this question, rendered by the Supreme Court of Pennsylvania, Justice Mitchell remarks that "legal presumptions ought to be logical inferences from the natural and useful conduct of men;" consequently, "no agent who is acting in his own antagonistic interest or who is about to commit a fraud by which his principal will be affected, does in fact inform the latter, and any conclusion drawn from a presumption that he has done so is contrary to all experience of human nature."⁴⁵

14. Liability of a Bank for Officer as Agent for Others.

Let us now turn to other transactions in which he has acted as agent for some other party beside the bank. In thus acting, does he ever render his bank liable, and, if so, to what extent? Suppose the president of a bank is an executor or trustee of an estate keeping its funds with his bank, is it ever liable for their misuse? In one of the cases he was co-executor of an estate

because they were negotiable, and the character of the notes for which they were pledged did not affect the other bank's title. *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law 513.

44 *Hicks v. Steel*, 126 Mich. 408; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Conyngham's Appeal*, 57 Pa. 474, 481.

45 *Gunster v. Scranton Heat & Power Co.*, 181 Pa. 327, 337, 338; *De Kay v. Hackensack Water Co.*, 38 N. J. Eq. 158, 161; *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33; *Frenkel v. Hudson*, 82 Ala. 158; *Terrell v. Branch Bank*, 12 Ala. 502; *Lucas v. Bank*, 2 Stew. (Ala.) 280, 321; *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481; *Bang v. Brett*, 62 Minn. 4; *First Nat. Bank v. Briggs*, 70 Vt. 594. For other cases see note 1 Banking Cases 23. See Chap. XI. §3.

and kept a deposit in the names of both.⁴⁶ Then the co-executor died, and thereafter he kept the deposit in his own name. As executor he withdrew the funds and misappropriated them. Nevertheless, the bank was held to be not responsible for his conduct, because it neither knew what he did, nor had any reason for suspecting him. The soundness of this ruling will be considered hereafter.

(a.) The cases may be divided into three classes: In the first he acts solely as agent for another party; in the second he has a personal interest independently of, or in addition to, that of his interest as agent; in the third he commits a fraud as an outside agent on an outside principal by means of the bank. A good illustration of the second class is that of a man who is president of a bank and a trust company, holding stock in both, and consequently having a personal interest in both independently of his interest as their chief officer. Somewhat different principles apply in the three classes of cases, as will be shown.

(b.) Of the first class the Knoblock case is a good illustration. The rule that should be applied is this: If the president, who is thus acting as a double agent, is the real manager and head of the bank, practically in control, then his knowledge should be imputed to the institution; and if he abuses his power it ought not to be permitted to screen itself behind the rule that when he is acting in his own interest in opposition to that of the institution he represents, it is ignorant and therefore not responsible for his conduct.

⁴⁶ Knoblock v. Germania Sav. Bank, 50 S. C. 259. Four of the directors of a bank formed a discount committee. They were also the promoters and organizers of another corporation and induced one to subscribe for stock and give his note therefor, through fraudulent representations. It was held that if the promoters in obtaining the note were carrying out the design of the discount committee representing the bank, it was charged with notice of the fraud. *State Bank v. Mentzer*, 125 Iowa 101. A bank possesses knowledge of the authority of an officer to act for another whose authority is in writing and known to the bank. If therefore he did not have authority to give notes, his bank would be regarded as having notice of his want of power. *Mechanics' Bank v. Schaumburg*, 38 Mo. 228.

The case of the City National Bank is instructive. The president usurped, through the negligence of the directors, all the bank's authority, grossly mismanaged its affairs, and became a heavy debtor to the institution. In reviewing his conduct the court remarked: "The president had been permitted to become and be the bank, as representing all its corporate functions, and both figuratively and in fact to be its eyes and ears, and all the several senses that can in law or theory pertain to corporate existence. When such a president starts out for a raid upon the financial credulity of other banks and capitalists for the purpose of capturing funds, with which to relieve himself and his bank from the embarrassments in which he has plunged it, there is no lack of reason or law in holding that his knowledge of any fraud he commits in obtaining the money shall be charged as notice to his bank, when it becomes the recipient of the plunder."⁴⁷

In Holden's case this distinction is clearly recognized. The chief actor in the transaction in controversy was the manager of the bank, G, who was also the executor of a will, besides having a personal interest in the matter. Thus he was interested in a triple capacity. He was the principal officer of the bank; indeed, in the words of the court: "It was not easy to separate him from it, or to consider him as other than the bank itself, so completely were the affairs of it subject to his will." Having wrongfully transferred the stock of the estate, the beneficiaries sued the bank for the amount, which sought to shield itself by professing the innocence of ignorance; that it had no knowledge of the manager's misdeeds. The court was not deluded by the sophistry. "That G held triple relations to the matter did not alter his relation to the bank, his principal, nor did it hinder his knowledge acquired as an agent from affecting his principal in the part he took as an agent. The subject-matter of his agency was the conduct and direction of the affairs of this bank. . . . Notice to him while so engaged, though not otherwise received than by the possession

47 City Nat. Bank v. National Park Bank, 32 Hun (N. Y.) 105, 109.

of knowledge acquired by him while acting in another capacity, was notice to the bank. If G, the individual and the executor and trustee, had made known to some other person, who was the manager of the affairs of the bank, all that G knew as individual and executor, that manager would have received notice in that capacity; why should it differ because G was the manager?"⁴⁸ That case, which thus clearly reveals the distinction between the cases in which an officer is acting alone, and as the manager and responsible for the bank, and the cases in which he is only one of several co-ordinate officers, has been often ignored and strangely misapplied. Yet the distinction is plain enough, its foundation is solid, and it ought to have been clearly seen in subsequent controversies.

(c.) Nevertheless, on many occasions, as in the *Knobeloch*

⁴⁸ 72 N. Y. 286, 293. Stocks standing on the books of a manufacturing corporation in the name of two persons, "executors of M," were transferred to P, "guardian" of minor children of M, and a certificate was issued to him. P endorsed the certificate and put it in D's possession for safe-keeping, who without P's knowledge procured an order for its sale and re-investment. He then assigned the certificate to a bank as collateral security for a loan to himself. Failing to pay, the stock was sold, purchased by the bank and transferred to the president, who was also president of the manufacturing corporation. The bank was held to possess knowledge of all the facts known by its president and the wards were entitled to recover both from the bank and the guardian. The bank was also declared negligent in not exercising sufficient care in transferring the stock. *Webb v. Graniteville Mfg. Co.*, 11 S. C. 396. The treasurer of a corporation who was short in his accounts, overdrew his account as treasurer at a bank, of which he was president, to pay checks on him by the corporation. By agreement with the bank he deposited his own funds to protect his overdrafts, but also checked from his treasurer's account to pay his private debts. At a later period, without authority, he executed the note of the corporation to cover his shortage. The amount of his private funds deposited, less the amount withdrawn to pay his private debts, left a remainder which was smaller than the amount of his shortage as treasurer by nearly the same amount as the unauthorized note. It was held that, as the deposits of private funds were by agreement made to protect the overdrafts as treasurer, the bank could not, as against the corporation, apply them to the deficit arising from the checks in payment of individual indebtedness, and hence could not recover on the note on the ground that the corporation had received the benefit. *Van Buren Co. Sav. Bank v. Sterling Woolen Mills Co.*, 125 Iowa 645.

case, the distinction has been disregarded and a bank has been screened from suffering for the known misdeeds of its officers. Since the bank permits him to exercise the agency, it should be responsible within proper limitations for his conduct. By accepting the account, the bank sanctions his agency. It should not be permitted afterward to say, in the event of his misconduct, that it did not know he was serving as an executor. In fact, the bank does know that he has misapplied the money, because to all intents and purposes in this transaction he is the bank. What a mockery of justice to say that his knowledge of his misdeeds are not to be imputed to his bank, when in truth it has the best possible knowledge concerning them.

Before this rule can be applied a preliminary inquiry becomes necessary. Was this double agent the real head of the bank, or only one of the several officers, who covered up his misdoing so effectually that the others did not know of it? Of course if they did know, then the bank would be clearly liable; but if they did not, and the wrong-doer was not the real head, then the bank might be regarded innocent and therefore not responsible for his misconduct. This inquiry is one of fact, and in some cases it may be difficult to determine to what extent the bank, as distinguished from the guilty officer, had actual knowledge.

(d.) Sometimes the agent controls both principals, for example, a president who is the real head and controller of a bank and also a trust company. In such a case Vice Chancellor Van Fleet understands "the law to be that where an agent representing two principals concocts a scheme to defraud one of them for the benefit of the other, it will be presumed that he did not disclose to the principal he intended to cheat means by which he intended to effect his purpose."⁴⁹ But this rule cannot be applied in all cases of this character. Thus

⁴⁹ *De Kay v. Hackensack Water Co.*, 38 N. J. Eq. 158, 161. See *In re Marseilles Extension R.*, L. R. 7 Ch. App. 161. The knowledge acquired by the treasurer of a company cannot be imputed to a bank of which he is cashier unless it has been actually revealed by him to some of its officers. *Wilson v. Second Nat. Bank*, 4 Sad. (Pa.) 68.

the president and cashier of a bank were the leading officers of a milling company, and illegally diverted the bank funds to the milling enterprise, in which a great loss was incurred.⁵⁰ The interests of the bank were subordinated to those of the milling company, yet the knowledge of the misdeeds of the officers was as clearly imputed to one company as to the other. Any other conclusion would have been opposed to plainest fact. In some cases, therefore, knowledge must be imputed to both principals; and the liability of the one to the other must depend on the application of other principles.⁵¹

(e.) Let us now turn to the other class of cases in which the bank officer has a personal interest independently of, or in addition to his interest as agent. How or when should his knowledge of what is done be imputed to his bank?

(e, 1.) In these cases it may be justly assumed that his personal interest will outweigh his interest as agent; the inquiry should then be undertaken to ascertain in which company or enterprise his personal interest is strongest, and having learned this, to decide accordingly. Thus if he were a director in two banks, and possessed a large amount of stock in the one and a small amount in the other, he doubtless would favor the one in which he had the largest interest.⁵² In like manner, if he were director in a great estate from the management of which he derived large profits, and a director or president of a bank

50 *Farmers & Traders' Bank v. Kimball Milling Co.*, 1 S. Dak. 388.

51 A son, who was secretary of an old corporation, applied to his mother for a loan for its benefit. A note was duly executed by himself and the president therefor. A new corporation was organized and the secretary and his brother agreed to take stock therein. Both corporations had essentially the same officers, who applied the loan without the lender's knowledge to pay for the stock in the new corporation. The old one was liable therefor, though it did not receive the money. *Allen v. West Point Mfg. Co.*, 132 Ala. 292.

52 Thus in *Germania Safety Vault Co. v. Driskell*, 23 Ky. L. Rep. 2050, the president of a bank was also president of a trust company. In a controversy between the latter and an estate on which it administered, the president's knowledge of his misdoings was imputed to both companies. "There are circumstances," said the court, "in which the proposition asserted would not apply. Were this a controversy between the two cor-

from which he received no salary and not much income in the way of dividends, the presumption would be that the interests of the estate would be most prominent in his mind, and therefore no knowledge of its affairs would be imputed to the bank if it were manifestly against his larger interest to preserve silence.

(e, 2.) The result of this inquiry, to ascertain in what direction lies his largest interest should not displace the real truth. If this should reveal that both principals had knowledge, then the law must work such relief by the application of other principles, as the circumstances may require.

(e, 3.) The principle applied in the Holden case may also be effectively and justly applied in some of the cases included in the class under consideration. If an officer's knowledge, regardless of his personal interest, was actually known by one company, but not by the other in which he was interested, then the court would decide accordingly. Thus, suppose the wrongful actor is the head of one company, and a less important officer in the other, as in the Gunster case, which is also represented by other officers. His wrong-doing would be imputed to the company of which he was the head; it might not be to the other. If the fact appeared that it did not know, then the rule of imputation ought not to be applied.

(f.) In the third class of cases he perpetrates fraud on his principal through the instrumentality of the bank. Thus a depositor authorized the teller of a bank to make and collect loans for her, but he was not authorized to draw any money on her account. Nevertheless, without her knowledge, the bank permitted him to withdraw money on a "teller's memorandum," which consisted in directing the bookkeeper to charge specified sums to her account used by himself. In thus acting

porations concerning a contract between them, and if it were more to the interest of the bank that the knowledge of its president in the transaction under consideration be concealed from the trust company, it might be so that in such state of case the president of the bank would not, even as president of the trust company, divulge to the latter the knowledge acquired in his other position inimical to the latter's interest."

he was using his official position to withdraw the money, for which the bank was liable.⁵³

15. His Authority as Agent to Borrow Money.

An officer who is acting as agent for another may borrow from his bank, like a stranger, when it is properly represented by other officers.⁵⁴ Again, when he is the sole manager, authority is sometimes given to him to borrow of his bank for his company, and to do other things, very much as though he were acting for himself. To grant him so much authority, it need hardly be repeated, is dangerous, yet is often done, and in many, though not in all states, has received judicial sanction. Whenever he possesses it, his bank is as clearly liable as when acting for his institution.

16. Officer's Authority as Agent Ceases on Principal's Insolvency.

It may be questioned whether a bank officer who is thus exercising a double agency has a right to continue his authority after the insolvency of the other company or individual for whom he is acting. Thus the cashier of a bank, who was also the treasurer of another company, endorsed its notes personally and discounted them at his bank. After his company's failure, he agreed with the assignee that he might withdraw the company's deposit, which otherwise would have been appropriated to the payment of its notes. The court decided that he had no authority to make such an agreement without the consent of the bank directors.⁵⁵

17. Two Banks Having Same Directors May Make Contracts.

Two corporations may be related in varying degrees, having perhaps the same president and to some extent the same directors, while others may have a directory essentially similar

53 *National Bank of Oshkosh v. Munger*, 36 C. C. A. 659; *Daniels v. Empire State Bank*, 92 Hun (N. Y.) 460.

54 See Chap. IX, §14 and VII. §15.

55 *Ellis v. First Nat. Bank*, 22 R. I. 565.

in constitution. It is well settled that the manager of two corporations may make a valid contract between them. "When the transaction is open, honest and fair, and known to the officials of both companies, it will be sustained."⁵⁶ Of course, when he is acting by full authority of the directors or stockholders of each company, his action is without any special significance.⁵⁷

Again, contracts may be made directly by the boards of two or more corporations; these are voidable, though if not avoided within a reasonable time they harden into permanence like ordinary contracts.⁵⁸ As experience has clearly shown that officers too often take advantage of their position to abuse their authority, making the company in which they have the least interest unjustly serve the other, in which their interest is greater, courts wisely regard their conduct with great suspicion.⁵⁹

⁵⁶ *Aldine Mfg. Co. v. Phillips*, 129 Mich. 240, citing *Booth v. Robinson*, 55 Md. 419; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Adams Mining Co. v. Senter*, 26 Mich. 73. "The courts view with jealousy the transactions of the man who stands in such a capacity, and will hold him to a strict account of his dealings. He must show that he has acted with clean hands, and when this is shown, the transactions will be sustained." *Ibid*. The court in *Pauly v. Pauly*, 107 Cal. 8, declared that there is no presumption that an agent of two parties will deal unlawfully with either, which is unquestionably true. The court added that it is only where the agent has personal interests, conflicting with those of his principal, that the law requires peculiar safeguard against his acts. The directors and managers of a corporation have a personal interest in them generally, but so long as they are interested in one, their personal interest often coincides with that of the corporation they represent. But when they are interested in two, this condition rarely exists; they have often a much larger interest in one than the other; and too often they seek to gain a distinct personal gain by using one to the manifest harm of the other.

⁵⁷ *Leathers v. Janney*, 41 La. Ann. 1120.

⁵⁸ *Roberts v. Washington Nat. Bank*, 11 Wash. 550; *Pauly v. Pauly*, 107 Cal. 8; *San Diego v. Pacific Beach Co.*, 112 Cal. 53; *Manuf. Sav. Bank v. Big Muddy Iron Co.*, 97 Mo. 38; *Hagerstown Mfg. Co. v. Keedy*, 91 Md. 430; *Evansville Public Hall Co. v. Bank*, 144 Ind. 34; *Salina Nat. Bank v. Prescott*, 60 Kan. 490.

⁵⁹ *Farmers & Traders' Bank v. Kimball Milling Co.*, 1 S. Dak. 388; *Lange v. Burke*, 69 Ark. 85.

18. Fraudulent Contracts May be Set Aside.

Contracts of this kind, when their real nature is proved, may be set aside and the property thus wrongfully transferred may be recovered by the defrauded company.⁶⁰ The ordinary rules that apply to the recovery of a trust fund wherever it can be found may be applied in such cases.

19. Non-imputation of Officer's Knowledge Does Not Apply in Such Cases.

The rule concerning the non-imputation of an officer's knowledge to his bank in which he is personally interested does not apply when all of them are acting to defraud it, and for the time being are the bank itself. The rule is limited to those

60 *Merchants & Farmers' Cotton Oil Co. v. Lufkin Nat. Bank*, 79 S. W. (Tex. Civ. App.) 651, is an interesting case. The treasurer of the oil company had a private bank. The company resolved that all paper intended for negotiation at this bank should be made by the company's general manager. The treasurer, who had general authority to issue negotiable paper for the company, forged the manager's signature to a note, negotiated it and converted the proceeds to his own use. On this note the company was not bound. The court reached this conclusion, "for the obvious reason that the principal is bound by the act of his agent only where the agent in performing the act in question, assumes to act for his principal." The purchaser dealt with the treasurer "as a private individual, and was not influenced, and could not have been properly influenced, by the belief that the paper was the act of [the treasurer] in behalf of the company." It had also authorized its secretary to attest and seal negotiable instruments executed for the company. He attested a note which the company's treasurer had executed, on which he had forged the signature of the general manager, who was required to sign notes that were to be negotiated by him. The court held that the genuine attestation of the signature by the company's secretary relieved an honest holder of the note, before maturity, from the necessity of further inquiry concerning the authenticity of the note and that the company must pay it, citing *Tome v. Parkersburg Branch R.*, 39 Md. 36; *New York & New Haven R. v. Schuyler*, 34 N. Y. 30; *Fifth Avenue Bank v. Forty-Second Street R.*, 137 N. Y. 231; *Allen v. South Boston R.*, 150 Mass. 200; *Cincinnati R. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351. If a bank officer lends to another company in which he is interested without proper security and the loan is known by the directors for several years, this operates as a ratification and the lending officer cannot be made personally liable. *First Nat. Bank v. Gaddis*, 31 Wash. 596. And the oral promise of such an officer to repay would be within the statute of frauds. *Ibid.*

cases in which a bank has other eyes and ears than those of the officer who is practicing the fraud. Thus a bank whose president is the executor of an estate, and misuses its funds, may properly be regarded as having no knowledge, because the president surely will not reveal his conduct to the board. On the other hand, the board exists as a body of watchmen, and it is their duty to watch his conduct, and ordinarily they are attentive. He is not left alone. But when he is deliberately left alone then a different rule applies. The bank must be held responsible for what he does and as knowing all that he knows himself.

20. Liability of Bank With Discount and Savings Bank Department.

Besides the banks and trust companies thus officered and managed by the same president and boards of directors, the practice is growing for banks of discount to organize and conduct a savings bank department. On some occasions the bank has failed and difficult questions growing out of the relationship of the two departments have been presented to the court for determination. On one of the latest occasions the question related to a lease of the premises wherein it had transacted business; and damages for the breach were chargeable pro rata against the assets of each department.⁶¹ In South Carolina a bank authorized a savings bank department, but charged no official especially to receive deposits. A made a deposit with the president on his representation that he was authorized to receive them.⁶² The bank was held for the amount; moreover, in such a case the depositor may prove the facts pertaining to the transaction by parol testimony.

In another case the two banks had distinct organizations, but occupied the same premises; the same man was treasurer of one, cashier of the other, and manager of both. He took securities from the savings bank and pledged them to secure a loan for the benefit of the other bank. It was held that the

61 McGraw v. Union Trust Co., 135 Mich. 609.

62 Bickley v. Commercial Bank, 43 S. C. 528.

knowledge of the cashier must be imputed to the bank, and that the savings bank could recover.⁶³

In Michigan a statute provides that a bank which transacts a commercial and savings business shall transact each kind separately and keep a separate record of the two kinds of business. Nevertheless, a bank violated the law and failed. So far, however, as its records and public reports revealed savings deposits invested in bonds and mortgages, they were held for distribution among the savings depositors.⁶⁴

How does the statute of limitations operate on an account transferred from one department to the other? Thus a depositor makes a transfer by check from the discount to the savings

63 *Fishkill Sav. Institute v. Bostwick*, 19 Hun (N. Y.) 354, *affd.* 80 N. Y. 162. The discount committee of a bank formed another corporation with subsidiary local corporations. As it was without capital, the promoters borrowed from the bank, securing their loans by notes obtained for subscriptions to the local associations. In an action by the bank on one of these notes, which had been obtained by fraudulent representations, the court held that if the promoters in their action were carrying out the design of the discount committee, who represented the bank, it was charged with notice of the fraud, though its officers had no personal knowledge of the method pursued. *State Bank v. Mentzer*, 125 Iowa 101. A savings bank is not charged with notice of infirmity in an assigned mortgage taken as security for a loan by the fact that its treasurer was cashier of the bank at which the mortgagor and mortgagee kept their accounts and might have learned the facts pertaining to the transaction. *Economy Sav. Bank v. Gordon*, 90 Md. 486. The president of a bank was a stockholder in another corporation of which the cashier was also a stockholder and secretary. The bank was not thereby charged with notice of a defence by the maker of a note given to the corporation and afterward transferred to the bank. *Iowa Nat. Bank v. Sherman*, 97 N. W. (S. Dak.) 12. A savings and national bank conducted business in the same room; and the treasurer of one was the cashier of the other. The savings bank issued a set of rules that were printed in the books given to depositors. At the treasurer's request some of the savings bank depositors surrendered their pass-books and received others purporting to be issued by the national bank. Nevertheless, in an action by them against the savings bank, they were charged with knowledge that, in issuing the national bank pass-books he exceeded his apparent authority as treasurer of the savings bank, and that there was nothing to show that it acquiesced in his mode of doing business. *Kelley v. Shenango Valley Sav. Bank*, 22 N. Y. App. Div. 202.

64 1 *Peters v. Union Trust Co.*, 131 Mich. 322, 324.

bank department, which is charged to his account in the one place and credited to him in the other. The transfer does not interrupt the running of the statute of limitations, and the cause of action accrues as soon as the money was first placed to his open account in the discount department.⁶⁵

Lastly, a department of such a bank that refuses to pay the check of a depositor having an ample fund therein, supposing it is in the other department, is liable in damages, though the amount may be temperate.⁶⁶

⁶⁵ Jones v. Goldtree, 142 Cal. 382.

⁶⁶ Lorick v. Palmetto Bank & Trust Co., 54 S. E. (S. C.) 206.

CHAPTER XIII.

KINDS AND KEEPING OF DEPOSITS.

- | | |
|---|---|
| <ol style="list-style-type: none">1. Nature of a deposit.2. Difference between deposit and loan.3. Deposit may be declined.4. Acceptance and delivery of deposit.5. Deposit made by telegraph.6. Classification of deposits.7. Transformation of deposits.8. Varying use of term, special deposit.9. Specific deposits. Kinds.<ol style="list-style-type: none">a. Deposit of money made special by statute.b. Trust deposits.c. Deposit of checks, etc., by depositors and proceeds as agent.d. Deposit of checks, money, etc., by non-depositors as agent.10. General deposit, if fiduciary, is not entitled to preference.11. Liability for keeping special deposit.12. Greater care is required if receiving compensation.13. Liability may be increased or diminished by agreement.14. Bank is not liable for official theft.15. Liability for paper lost in collecting.16. Liability for loss of collaterals. | <ol style="list-style-type: none">17. Care required in delivery.18. Special deposit is not an asset of an insolvent bank.19. Receiving deposits after banking hours.20. Public deposits.<ol style="list-style-type: none">a. By newer rule officer must exercise proper care.b. By older and more general rule he is an insurer.c. Application of newer rule.d. Right of action by state or other owner of deposit against depositary.e. Depositary's duty to prevent officer's misuse of funds.f. Ownership of mingled deposits.21. Deposits of executors and administrators.<ol style="list-style-type: none">a. Care required in keeping a deposit.b. Payment to beneficiaries.c. Duty to obtain an income therefrom.d. Should be kept in official name.e. Recovery when deposit becomes mingled.22. Interest.23. Running of statute of limitations against deposits. |
|---|---|

1. Nature of a Deposit.

As we have seen, the chief business of a bank is to receive and lend money. No little confusion has arisen in regarding

a deposit which in truth is only a loan and a debt, as a bailment. In many cases a deposit is a bailment, the depositor expecting to receive the identical thing demanded;¹ generally, he expects to receive only something of similar value.²

2. Difference Between Deposit and Loan.

"A deposit differs essentially from a loan. That is for the benefit of the borrower, while a deposit is for the benefit of the depositor. The depository may obtain an incidental advan-

1 Keene v. Collier, 1 Met. (Ky.) 415, 417; State v. Clark, 4 Ind. 316.

2 Marine Bank v. Fulton Bank, 2 Wall. (U. S.) 252; Matter of Paterson, 18 Hun (N. Y.) 221; Commercial Bank v. Hughes, 17 Wend. (N. Y.) 94, 100; Downes v. Phoenix Bank, 6 Hill (N. Y.) 297; Commercial Nat. Bank v. Henninger, 105 Pa. 496; Kenne v. Collier, 1 Met. (Ky.) 415; Hawes v. Blackwell, 107 N. C. 196, 200; Perth Amboy Gas Light Co. v. Middlesex Co. Bank, 60 N. J. Eq. 84; Carr v. National Security Bank, 107 Mass. 45, 48.

Contra.—Elliott v. Capital City State Bank, 128 Iowa 275; Officer v. Officer, 120 Iowa 389; Hunt v. Hopley, 120 Iowa 695. In Law's Estate, 144 Pa. 499, 507, Clark, J., said: "Whilst the relation between the depositor and his banker is that of debtor or creditor simply, the transaction cannot in any proper sense be regarded as a loan, unless the money is left, not for safekeeping, but for a fixed period at interest, in which the transaction assumes all the characteristics of a loan." And the same rule was declared in Eshleman v. Bolenius, 144 Pa. 269. But it is opposed by the general current of authority, if not by Commercial Nat. Bank v. Henninger, 105 Pa. 496, 500, in which Paxson, J., remarks: "The money deposited does not, as is popularly assumed, continue to be the property of the depositor. It becomes the money of the bank the moment it is deposited. The depositor becomes the creditor of the bank." In Foley v. Hill, 2 H. of L. (Eng.) 27, 44, the Lord Chancellor says: "This trade of a banker is to receive money, and use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, and for which money he is accountable as a debtor." In Bank v. Brewing Co., 50 Ohio St. 151, 157, the court said: "The bank is accountable as a debtor; and the relation between it and the general depositor is essentially that of debtor and creditor. In legal effect, the deposit is a loan to the bank." In Alston v. State, 92 Ala. 124, 128, it is said that "money received by a bank on general deposit becomes the property of the bank and can be loaned or otherwise used by it as other moneys belonging to it. The depositor's claim is a mere chose in action for so much money." In Watts v. Christie, 11 Beav. 546, 551, the court said: "In the ordinary relation between banker and customer, the customer is a mere common creditor of the banker."

tage, but that is seldom the original object contemplated. In a loan, the borrower promises to return the money at a future time; in a deposit, whenever the money is demanded."³

3. Deposit May be Declined.

A bank is not like an inn-keeper, who is obliged to serve everybody applying for admission, fit to be received. A bank can select its customers, and exercises this right.⁴ Some of the larger banks decline to receive deposits because the amount is not large enough to yield a profit commensurate with the risk and expense of keeping them. In like manner a bank can dissolve the relation.⁵

4. Acceptance and Delivery of Deposit.

If a deposit be accepted and delivered at the counter to one of the bank's officers who has apparent or ostensible authority to receive it, the depositor is justified in his action.⁶ And if he gives money to the president in the building, intended for deposit, the depositor is not required to follow him and oversee the work of the recorder.⁷

5. Deposit Made by Telegraph.

A deposit may be made by telegraph. And money deposited in one bank to the account of another with directions to pay

3 Ladd, J., *Hunt v. Hopley*, 120 Iowa 695, 698. See also *Law's Estate*, 144 Pa. 499, and *Officer v. Officer*, 120 Iowa 389, 392. A bank that receives a deposit promising to repay at the end of a year or other period with interest, and sooner after a notice of thirty days or other period, becomes simply the debtor therefor. *Leaphart v. Commercial Bank*, 45 S. C. 563. A bank taking state funds subject to check and agreeing to pay interest on the daily balance is a deposit and not a loan. *State v. First Nat. Bank*, 88 Fed. 947.

4 *Thatcher v. State Bank*, 5 Sand. (N. Y.) 121. See *Baker v. State*, 54 Wis. 368. See Chap. VI. §5.

5 *Chicago Marine & Fire Ins. Co. v. Stanford*, 28 Ill. 168.

6 *Burnell v. San Francisco Sav. Union*, 136 Cal. 499. "If the conduct of the bank has been such as to justify the depositor in believing that he is authorized to receive the money, the bank cannot exonerate itself from liability by showing that no express authority therefor had been given by the board of directors." *Ibid*, 502.

7 *Jumper v. Bank*, 48 S. C. 430

the amount by telegram to a third is a specific deposit.⁸ Again, an entry made by a bank, acting on a telegraphic dispatch from a person that he had deposited with the bank's correspondent a fund for the use of one of its customers, with which he is credited, while debiting the amount to its correspondent, is a provisional deposit. It therefore does not operate to transfer the title to the fund before its receipt.⁹

6. Classification of Deposits.

Deposits are of three kinds, general, special and specific. A general deposit always consists of money,¹⁰ and the relationship between bank and depositor is that of debtor and creditor.¹¹ Should the deposit be lost, therefore, the bank would be absolutely responsible like the borrower of money for which he has given his note.¹²

8 *Montagu v. Pacific Bank*, 81 Fed. 602. If the second bank fails after receiving the money, but before paying it to the third, the full amount may be recovered by the depositor. *Ibid.* A debtor having deposited in a New York bank the amount due to his creditor in Helena, Montana, the New York bank telegraphed a bank in Helena to pay the debt and charge the amount to the other. The creditor was unwilling to be credited with the amount, because he questioned its solvency, but accepted a draft on the New York bank on condition that it was to be payment, if honored. As the Helena bank failed before payment of the draft, the deposit in the New York bank was regarded as special and belonging to the creditor. *Moreland v. Brown*, 30 C. C. A. 23; *Farley v. Turner*, 26 Law J. Ch. (Eng.) 710. See §19.

9 *American Ex. Nat. Bank v. Loretta Mining Co.*, 165 Ill. 103.

10 *Marine Bank v. Fulton Bank*, 2 Wall. (U. S.) 252; *Bank v. Brewing Co.*, 50 Ohio St. 151.

11 *In re Madison Bank*, 5 Biss. (U. S.) 515; *Balbach v. Frelinghuysen*, 15 Fed. 675; *City of St. Louis v. Johnson*, 5 Dill. (U. S.) 241; *Thompson v. Riggs*, 5 Wall. 663, affg. 6 D. C. 99; *Himstedt v. German Bank*, 46 Ark. 537; *Collins v. State*, 33 Fla. 429; *McLain v. Wallace*, 103 Ind. 562; *Perley v. Muskegon Co.*, 32 Mich. 132; *Neely v. Rood*, 54 Mich. 134; *Nehawka Bank v. Ingersoll*, 2 Neb. (Unof.) 617; *Boyden v. Bank*, 65 N. C. 13; *Matthews v. Creditors*, 10 La. Ann. 344; *Schmidt v. Barker*, 17 La. Ann. 261; *National Bank v. Eliot Bank*, 5 Am. Law Reg. (N. S.) 711; *Knecht v. U. S. Sav. Institution*, 2 Mo. App. 563; *Baker v. Kennedy*, 53 Tex. 200; *Bank v. Brewing Co.*, 50 Ohio St. 151; *Bank v. Jones*, 42 Pa. 536; *Dabney v. State Bank*, 3 Rich. (S. C.) 124; *Robinson v. Gardner*, 18 Gratt. (Va.) 509.

12 *Ibid.*

A general deposit may be deposited in the name of the owner;¹³ in the name of an agent as agent or trustee;¹⁴ in the agent's name alone;¹⁵ in an agent's name while disclosing that of his principal;¹⁶ lastly, in the principal's name while adding his own without disclosing in any way his relation to his principal.¹⁷ But a deposit to his own credit by an auctioneer, consisting of the proceeds of goods sold by him, cannot be recovered by their owners; they are merely creditors of the depositor.¹⁸

Authority to deposit for a principal includes authority to endorse his checks if this be necessary for the purpose of deposit.¹⁹ But only those checks are included that rightfully belong to the principal, not those acquired by his agent in an unlawful manner.²⁰

As the funds deposited in an agent's name belong to his principal, he can reclaim them; and if the bank refuses to pay he can obtain them through the aid of the law.²¹

General deposits may be payable on demand.²² or at a fixed

13 *Martin v. Kansas Nat. Bank*, 66 Kan. 655. A bank cannot assume that an agent who has made a deposit for a disclosed principal has named a fictitious, and not a real person. *Honig v. Pacific Bank*, 73 Cal. 464.

14 *City Bank v. Kent*, 57 Ga. 283.

15 See Chap. XVI. §9a; *Farmers' & Mech. Bank v. King*, 57 Pa. 202; *Ringo v. Field*, 6 Ark. 43, 49. An agent who does this without authority is guilty of conversion. *Ibid.*

16 *Keene v. Collier*, 1 Met. (Ky.) 415; *Van Alen v. American Nat. Bank*, 52 N. Y. 1.

17 *Case v. Hammond Packing Co.*, 105 Mo. App. 169. Nor will an overdraft drawn on such an account bind his principal. *Ibid.*

18 *Levy v. Cavanagh*, 2 Bos. (N. Y.) 100; *Marten v. Rocke*, 53 Law T. Rep. (Eng. N. S.) 946. And if a sale be not completed, the purchaser cannot recover interest on his deposit with the auctioneer until after making a demand. *Walsh v. Meyer*, 3 N. Y. State Rep. 579.

19 *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151; *Jackson v. Bank*, 92 Tenn. 154; *Graham v. U. S. Sav. Institution*, 46 Mo. 186.

20 *Fay v. Slaughter*, 194 Ill. 157, revg. 94 Ill. App. 111. See *Jackson Paper Mfg. Co. case*, 199 Ill. 151.

21 *Zeltman v. Zeltman*, 28 Pa. Co. Ct. 345.

22 *Williams v. Rogers*, 14 Bush (Ky.) 776. A deposit for which a certificate is given is a general deposit like one entered in a depositor's pass

time.²³ By far the larger portion of general deposits is payable on the demand of depositors.

7. Transformation of Deposits.

A general deposit is not transformed into a specific one by drawing checks immediately against it, even if they have been certified.²⁴ On the other hand, a specific,²⁵ does not become a general deposit by mingling the money in the general fund without the depositor's knowledge and consent.²⁶ A deposit is presumed to be general,²⁷ but the presumption always yields to the truth as soon as this is ascertained.²⁸

Whether a deposit is general or special is often a question of fact or intent. Thus a woman once left money with a bank stating she did not wish a check-book, as she would want the money in a few days. Nevertheless one was given to her. She further said that she did not wish to become a regular depositor at the bank. Yet she was held to be a general depositor, the court interpreting her words as meaning "that she did not contemplate making a practice of leaving money there."²⁹ Prima facie every deposit is general.³⁰

8. Varying Use of Term Special Deposit.

The term special deposit has a varying judicial meaning. Thus a court in Illinois, when saying that a special deposit must always be returned to the owner, whether the bank is

book. *Wallace v. State Bank*, 2 Eng. (Ark.) 61; *Mutual Accident Assn. v. Jacobs*, 141 Ill. 261.

²³ See Chap. XIV.

²⁴ *Laclade Bank v. Schuler*, 120 U. S. 511; *People v. St. Nicholas Bank*, 77 Hun (N. Y.) 159. See *Harrison v. Wright*, 100 Ind. 515.

²⁵ *People v. St. Nicholas Bank*, 77 Hun (N. Y.) 159.

²⁶ *Kimmel v. Dickson*, 5 S. Dak. 221; *State v. Thum*, 6 Idaho 323. See *Mutual Accident Assn. v. Jacobs*, 141 Ill. 261.

²⁷ *Nichols v. State*, 46 Neb. 715; *Bank of Blackwell v. Dean*, 9 Okla. 626; *Brahm v. Adkins*, 77 Ill. 263; *Bank v. Brewing Co.*, 50 Ohio St. 151; *Ward v. Johnson*, 95 Ill. 215; *Boettcher v. Colorado Nat. Bank*, 15 Colo. 16.

²⁸ *Nichols v. State*, 46 Neb. 715.

²⁹ *State v. Dickerson*, 81 Pac. 497.

³⁰ *Brahm v. Adkins*, 77 Ill. 263; *Bank v. Dean*, 8 Okla. 626.

solvent or otherwise,³¹ meant a specific thing, like a bond or a specific deposit of money.³² To these may be added deposits marked "special," or which are put into a special place at the time of receiving them, because of the bank's pending insolvency,³³ or other reason.³⁴ Other courts and legislatures have given a broader signification to the term. They often mean by a special deposit of money one that need not be specifically kept, but must be returned in amount, even though the bank should be insolvent, in preference to paying general depositors. The more usual conception of a special deposit is money deposited with a bank for a specified period, but for no specified purpose.

9. Specific Deposits. Kinds.

A specific deposit is not to be actually returned, and is often made for a specific purpose, for example, money to pay a note; or a note for collection. But money deposited for a particular purpose by a depositor, or by some one for him, of which the bank has no particular care or use, and perhaps no knowledge, is not a specific deposit.³⁵ Its nature will appear more clearly in the following classification:

(a.) First, deposits of money, an equal amount of which, by statutory command, is to be returned to the depositor; and, should the bank fail and be unable to pay all depositors, is to

31 *Star Cutter Co. v. Smith*, 37 Ill. App. 212; *First Nat. Bank v. Dunbar*, 118 Ill. 625. "A general deposit is one which is to be repaid, on demand, in money. A special deposit is one in which the depositor is entitled to the return of the identical thing deposited." *Burford, Ch. J., Bank of Blackwell v. Dean*, 9 Okl. 626, 630.

32 *Mutual Accident Assn. v. Jacobs*, 43 Ill. App. 340, *affd.* 141 Ill. 261; *First Nat. Bank v. Dunbar*, 118 Ill. 625; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82; *State v. Bank*, 5 Bax. (Tenn.) 101; *In re Mutual Building Fund Bank*, 2 Hughes (U. S.) 374.

33 *Beal v. City of Somerville*, 1 C. C. A. 598.

34 *Cragie v. Hadley*, 99 N. Y. 131; *Chaffee v. Fort*, 2 Lans. (N. Y.) 81; *Anderson v. Pacific Bank*, 112 Cal. 598; *In re Commercial Bank*, 2 Ohio Dec. 304; *San Diego Co. v. California Nat. Bank*, 52 Fed. 59; *First Nat. Bank v. Armstrong*, 36 Fed. 59; *Furber v. Stephens*, 35 Fed. 17; *Sadler v. Belcher*, 2 M. & Rob. (Eng.) 489.

35 *Wetherell v. O'Brien*, 140 Ill. 146.

be repaid from the general assets in preference to paying the general creditors.³⁶

(b.) Second, deposits of money, either in their original or substituted form, that are an implied trust deposit, and must be paid in preference to other deposits.³⁷

(c.) Third, checks,³⁸ notes,³⁹ drafts,⁴⁰ mortgages,⁴¹ and other instruments,⁴² deposited with a bank as an agent for col-

36 Savings Bank deposits. *Rosenback v. Manuf. & Builders' Bank*, 69 N. Y. 358; *Upton v. New York & Erie Bank*, 13 Hun (N. Y.) 269; *Elmira Sav. Bank v. Davis*, 142 N. Y. 590, revsd. 161 U. S. 275; *Peters v. Union Trust Co.*, 131 Mich. 322.

Public deposits. *Matter of Western Marine Ins. Co.*, 38 Ill. 289; *Board of Fire Comrs. v. Wilkinson*, 119 Mich. 655; *City of Marquette v. Wilkinson*, 119 Mich. 413; *Independent District v. King*, 80 Iowa 497; *Wolffe v. State*, 79 Ala. 201; *State v. Midland State Bank*, 52 Neb. 1; *Yarnell v. City of Los Angeles*, 87 Cal. 603; *Fogg v. Bank*, 80 Miss. 750; *City of Larned v. Jordan*, 55 Kan. 124; *First Nat. Bank v. Bunting*, 7 Idaho 27; *State v. Thum*, 6 Idaho 323; *Green v. Custer Co.*, 8 Idaho 721; *Chambers v. Custer Co.*, 8 Idaho, 724; *Ward v. Johnson*, 95 Ill. 215; *San Diego Co. v. Cal. Nat. Bank*, 52 Fed. 59. In *State v. Thum*, 6 Idaho 323, it was held that "if a bank receives public money by virtue of a statute in that state, it must keep such money separate from its own funds. The bank must not use it or loan it." The bank cannot by commingling this money with its own acquire any title thereto. Consequently, should the bank fail, it cannot be distributed among the bank's general creditors. A charter providing that guardians and trustees should have a preference in the event of the bank's dissolution are also entitled to interest on them although they received less interest on them when the bank was agoing. *People v. American Loan & Trust Co.*, 36 N. Y. Misc. 355.

37 See Chaps. XVI, §7 and VI, §9. A special depositor who is falsely told that there is enough money to pay him, and receives in part payment a draft, does not waive his right to have a trust impressed on the assets of the bank. *Sherwood v. Central Mich. Sav. Bank*, 103 Mich. 109. A certificate of deposit requiring payment "in certain notes" and marked "Special deposit," is a specific deposit that must be returned. *Niblack v. Cosler*, 26 C. C. A., 16, affg. 74 Fed. 1000. Nor is the liability changed by unintentionally substituting another certificate calling for "current funds" instead of "certain notes." *Ibid.* The creation of a trust does not depend upon the use of a particular form of words, but it may be inferred from the facts and circumstances of the case. *O'Neil v. Greenwood*, 106 Mich. 572, 579.

38 *State v. Bank of Commerce*, 61 Neb. 181. A requested a bank to buy stock for him on margin, giving the bank a check for the marginal amount. The bank sent the money required to pay for the stock to its

section, and also the proceeds from collecting them;⁴³ purchase money in transactions wherein the bank has acted as agent;⁴⁴ besides money⁴⁵ deposited for the purpose of having the bank send,⁴⁶ lend,⁴⁷ or pay⁴⁸ the same; checks or money deposited as security for some undertaking—all these instruments, proceeds, or money, should the bank fail before completing its agency, must be returned to the depositor.⁴⁹

correspondent in New York, and a check to the broker who made the purchase on the correspondent bank. The remitting bank having failed before the broker received his money, he resold the stock and the assignee of the failed bank received the money from the correspondent. The transaction between A and the bank was not regarded as a purchase of stock with his money, consequently the debtor and creditor relation existed between them and A could not recover as a trust fund the marginal amount he had paid to the bank. *Downing v. Lellyett*, 36 S. W. (Tenn.) 890.

39 *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, citing many cases; *Peak v. Ellicott*, 30 Kan. 156. When the real owner of a note delivers it to a bank with authority to collect the proceeds and apply them in payment of the owner's indebtedness to the bank, it is his agent unless it has received and accepted the note as collateral security. *Prescott v. Leonard*, 32 Kan. 142.

40 *First Nat. Bank v. Hummel*, 14 Colo. 259.

41 *Hazeltine v. McAfee*, 5 Kan. App. 119; *Star Cutter Co. v. Smith*, 37 Ill. App. 212; *State v. State Bank*, 42 Neb. 896; *Sherwood v. Cent. Mich. Sav. Bank*, 103 Mich. 109; *Wallace v. Stone*, 107 Mich. 190. See *Edson v. Angell*, 58 Mich. 336.

Contra.—*Francis v. Evans*, 69 Wis. 115; *Sales v. Cox*, 95 Tenn. 579, runs against the current of the other cases. A note and mortgage was sent by a non-resident and non-depositor to a bank for collection. The maker delivered a check drawn on the same bank in payment, which was accepted. Doubtless as between the owner and maker of the note it was paid, as the bank acted as the agent for the creditor to make the collection. But the court declared that the bank had become a debtor for the amount collected, and therefore that no trust existed. To reach this conclusion the court in effect held that the bank changed its original agency relation into that of a debtor and creditor without any agreement or understanding of any kind with the owner of the note. This it cannot do.

42 Bonds for collection were delivered by the owner to a bank for transmission as agent to its correspondent to the place where they were payable. The latter also became the agent of the owner and liable for neglect in making the collection. *Kelley v. Phoenix Nat. Bank*, 17 N. Y. App. Div. 496; *Lafort v. Carpenter*, 91 Hun (N. Y.) 76.

43 *Commercial Bank v. Red River Valley Nat. Bank*, 8 N. Dak. 382. See Chaps. XVII. §8, XVIII. §10.

(d.) Finally, in making collections for a non-depositor, the bank acts as agent, and therefore the paper received from him and its proceeds from the debtor fall within the category of specific deposits, and cannot be taken by the bank's creditors,⁵⁰ but if in its possession must be returned to the owner.⁵¹

44 *Officer v. Officer*, 120 Iowa 389, 392; *People v. City Bank*, 96 N. Y. 32; *Brahm v. Adkins*, 77 Ill. 263; *Peak v. Ellicott*, 30 Kan. 156; *German Nat. Bank v. Foreman*, 138 Pa. 474; *Brooke v. King*, 104 Iowa 713. But if payment to the vendor consisted merely in charging the buyer and crediting his account by the bank without clear proof that the purchaser had that amount of money in the bank at the time, the depositor would not be entitled to a preference. *Ibid.*

45 *Anderson v. Pacific Bank*, 112 Cal. 598; *First Nat. Bank v. Hummel*, 14 Colo. 259; *Kimmel v. Dickson*, 5 S. Dak. 221; *Ellicott v. Barnes*, 31 Kan. 170; *Peak v. Ellicott*, 30 Kan. 156; *Kansas State Bank v. First State Bank*, 62 Kan. 788; *Brockmeyer v. Washington Nat. Bank*, 40 Kan. 376; *Center v. McQuesten*, 18 Kan. 476; *Ryan v. Phillips*, 3 Kan. App. 704; *Mayer v. Chattahoochee Nat. Bank*, 51 Ga. 325; *Pace v. Howard College*, 15 Ga. 486; *Sherwood v. Milford State Bank*, 94 Mich. 78, 81; *People v. City Bank*, 96 N. Y. 32; *People v. Bank of Dansville*, 39 Hun (N. Y.) 187; *Clots v. Bently*, 5 Alb. L. J. 286; *Harrison v. Smith*, 83 Mo. 210; *Stoller v. Coates*, 88 Mo. 514; *Woodhouse v. Crandall*, 197 Ill. 104; *Continental Nat. Bank v. Weems*, 69 Tex. 489; *Hunt v. Townsend*, 26 S. W. (Tex. Civ. App.) 310; see *McDonald v. American Nat. Bank*, 25 Mont. 456; *Foster v. Rincker*, 35 Pac. (Wyo.) 470; *Dearborn v. Washington Sav. Bank*, 13 Wash. 345; *City of St. Louis v. Johnson*, 5 Dil. (U. S.) 241; *Massey v. Fisher*, 62 Fed. 958; *Owen v. Bowen*, 4 C. & P. (Eng.) 93, 96; *Cobb v. Beeke*, 6 Q. B. 930; *Surtees v. Hubbard*, 4 Esp. 203; *Wharton v. Walker*, 4 B. & C. 163. Money left by an endorser on a note to pay it. *Massey v. Fisher*, 62 Fed. 958.

46 A loan to a third person in which a bank acts as agent in sending the funds creates a trust relation, and the fund may be recovered by the owner. *Greer v. Dalles Nat. Bank*, 98 Fed. 681.

47 *Larsen v. Utah Loan & Trust Co.*, 23 Utah 449. But see *Wetherell v. O'Brien*, 140 Ill. 146.

48 *Merchants' Nat. Bank v. School District*, 36 C. C. A. 432; *Star Cutter Co. v. Smith*, 37 Ill. App. 212; *National Bank v. Speight*, 47 N. Y. 668.

Contra.—*German Nat. Bank v. Foreman*, 138 Pa. 474. If money to pay a debt is deposited with a bank which fails before applying it, the debtor's liability to the creditor or owner of the claim is unchanged. *Moore v. Meyer*, 57 Ala. 20. A cashier of a bank negotiated a loan to pay for real estate. He delayed to pay over the money received from the lender to the vendee, claiming there was a defect in the title. At length he sent the vendee a certificate of deposit payable "when the land title was straight-

10. General Deposit, if Fiduciary, is Not Entitled to Preference.

A deposit is neither special nor specific simply by calling it so;⁵² nor by receiving interest thereon;⁵³ to possess that character and thus occupy a higher plane should the bank fail, there must be a valid reason for giving it precedence. In these cases there is a trust relation between the principal and agent, but none between either the principal or agent and the bank. The deposit is governed in all respects like any other general deposit.⁵⁴ Money, therefore, deposited by a public officer in

ened out." After the bank's failure the vendee claimed that a trust was impressed on the money, which the court sustained. The principal defence was that the vendee was a voluntary creditor of the bank, but the court maintained that although he held a certificate of deposit he was not "by this consenting nor intending that his money should be mingled with that of the bank and that it should become his debtor therefor." *State v. State Bank*, 42 Neb. 896. Money deposited for paying the debts of a corporation, which by agreement is to be used for no other purpose until they are paid, is a trust fund. *Ellis v. National Ex. Bank*, 86 S. W. (Tex. Civ. App.) 776.

49 *Woodhouse v. Crandall*, 197 Ill. 104; *Anderson v. Pacific Bank*, 112 Cal. 598. See *Kinsela v. Cataract City Bank*, 18 N. J. Eq. 158.

Contra.—*State Building Assn. v. Mechanics' Sav. Bank*, 36 S. W. (Tenn. Ch. App.) 967; *Dearborn v. Washington Sav. Bank*, 13 Wash. 345; *Mutual Accident Assn.*, 141 Ill. 261, affg. 43 Ill. App. 340.

50 *Plano Mfg. Co. v. Auld*, 14 S. Dak. 512; *Henderson v. O'Connor*, 106 Cal. 385; *Nurse v. Satterlee*, 81 Iowa 491; *Wallace v. Stone*, 107 Mich. 190; *First Nat. Bank v. Sanford*, 62 Mo. App. 394; *Griffin v. Chase*, 36 Neb. 328; *People v. Merchants' Bank*, 92 Hun (N. Y.) 159; *German Fire Ins. Co. v. Kimble*, 66 Mo. App. 370.

Contra.—*Sayles v. Cox*, 95 Tenn. 579.

51 *Ibid.*

52 A deposit marked "special" in a depositor's pass book may be shown to be general. *Carr v. State*, 104 Ala. 43. See *McLain v. Wallace*, 103 Ind. 562.

53 *Ibid.*

54 See Chap. XVI. §7; *Officer v. Officer*, 120 Iowa 389. A depositor wrote on his deposit slip, "Security for signing bond to be held by bank." Subsequently he received two certificates of deposit for the amount, one for \$800, payable to the surety of the bond above mentioned, and another for \$700, payable to another surety. The first certificate was paid before the failure of the bank; the attempt to regard the other as given for a special deposit and therefore entitled to a preference failed. *Dearborn v. Washington Sav. Bank*, 13 Wash. 345. Money belonging to a board of education was deposited to their credit in a bank of which their treasurer was

his official name is none the less a general deposit unless positive law establishes a different rule.⁵⁵

11. Liability for Keeping Special Deposit.

Bonds, stock, and other securities are kept by banks to accommodate their customers. In earlier days, when bank vaults were the safest places for storing valuables, banks kept their customers' securities simply for accommodation. Since the advent of companies especially devoted to this business, the banks are relieved of a large part of this unwelcome burden.

Though receiving no compensation, banks are obliged to exercise reasonable care in keeping them,—such care as a prudent man would take of similar property.⁵⁶ The taking of such care as a man takes of his own will not always suffice; for, if this were the rule, and a man was careless in protecting his own property, he could escape from responding to losses occasioned by negligence in keeping the property of others. The observance of the rule is a question of fact that must be

the cashier. There was no division of the fund for any improper use. After the failure of the bank the board sought to recover the fund as a preference, or trust fund by virtue of a statute prohibiting public officers from commingling their funds with others. The contention failed. *Board of Education v. Union Trust Co.*, 136 Mich. 454. Money deposited by an agent in his own name, with the knowledge and consent of his principal, creates no trust between the depositor and bank whereby it has a preference should it fail. *State v. Thomas*, 53 Neb. 464. Otherwise if the principal had no knowledge of his agent's action. *State v. State Bank*, 42 Neb. 896.

55 *Retan v. Union Trust Co.*, 134 Mich. 1; *Perley v. County of Muskegon*, 32 Mich. 132; *Fletcher v. Sharpe*, 108 Ind. 276; *McLain v. Wallace*, 103 Ind. 562; *Jones v. Chesebrough*, 105 Iowa 303; *McAfee v. Bland*, 11 Ky. L. Rep. 1; *Eyerman v. Second Nat. Bank*, 84 Mo. 408, affg. 13 Mo. App. 289; *Swartwout v. Mechanics' Bank*, 5 Denio (N. Y.) 555; *Southern Development Co. v. Houston R.*, 27 Fed. 344; *Otis v. Gross*, 96 Ill. 612; *Mat-ter of Western Marine Ins. Co.*, 38 Ill. 289; *Shaw v. Bauman*, 34 Ohio St. 25; *Paul v. Draper*, 158 Mo. 197; *Officer v. Officer*, 120 Iowa 389. See §21.

56 *Gray v. Merriam*, 148 Ill. 179; *Smith v. First Nat. Bank*, 99 Mass. 605; *Bank v. Zent*, 39 Ohio St. 105; *Whitney v. First Nat. Bank*, 55 Vt. 154; *Lancaster Co. Nat. Bank v. Smith*, 62 Pa. 47; *Gerrish v. Muskegon Sav. Bank*, 100 N. W. (Mich.) 1000; *Preston v. Prather*, 137 U. S. 604.

ascertained in every case; an inquiry that can hardly be obviated by the formulation of any rule, however precise or absolute.

12. Greater Care is Required if Receiving Compensation.

Far more care must be exercised by a safe deposit company or bank that is paid for keeping special deposits; for then the keeper is an insurer;⁵⁷ but the ordinary benefit derived from keeping a customer's deposit is, not a sufficient compensation to clothe the bank with the greater risk incurred by the special security keeper.⁵⁸

13. Liability May be Increased or Diminished by Agreement.

A bank may make a special agreement in the way of defining its liability.⁵⁹ "Representations," says Justice Brewer, "may be made to induce strangers to commence or depositors to continue depositing which will call for increased care on the part of the bailee."⁶⁰

14. Bank is Not Liable for Official Theft.

If special deposits or securities are taken, stolen or purloined by the officer of the bank, the rule is not invaded, for they are not employed to do these things. The bank is no more liable for their conduct than for that of strangers.⁶¹ But if

57 *Roberts v. Stuyvesant Safe Dep. Co.*, 123 N. Y. 57; *Lockwood v. Manhattan Storage & Warehouse Co.*, 28 N. Y. App. Div. 68; *Cussen v. Southern Cal. Sav. Bank*, 133 Cal. 534. A deposit of silver left with a bank for sale on specified terms it has no right to transmit to a branch bank and have credited to the depositor. After the failure of the banks, the officer who sent the silver would be liable for its value. *El Paso Bank v. Fuchs*, 89 Texas 197.

58 *Giblin v. McMullen*, L. R. 2 P. C. 317.

Contra.—*White v. Commonwealth Nat. Bank*, Fed. Cas. No. 17, 544.

59 *Hale v. Rawllie*, 8 Kan. 136; *Maury v. Coyle*, 34 Md. 235; *McLain v. Wallace*, 103 Ind. 562; *Jenkins v. National Village Bank*, 58 Me. 275.

60 *Hale v. Rawllie*, 8 Kan. 136. "A mere showing to a depositor of the facilities and security of a bank does not amount to any such representation as will enhance the obligations of the banker." *Ibid.*

61 *Foster v. Essex Bank*, 17 Mass. 479; *Sturges v. Keith*, 57 Ill. 451; *Gray v. Merriam*, 148 Ill. 179; *Lancaster Co. Nat. Bank v. Smith*, 62 Pa.

the directory knew, or suspected, that their cashier was a thief, or inclined to make personal use of such securities, it would be reprehensible for retaining him, and they and their bank would be liable for the ill results. Whether a directory is guilty in retaining a cashier or other managing officer who is known to be deeply engaged in speculating, is among the unsettled questions, though the courts are looking with increased disfavor on directors who shut their eyes to these things.⁶²

A special depositor is not affected by a by-law of which he has no knowledge, providing that he assumes the risk of such a deposit.⁶³

15. Liability for Paper Lost in Collecting.

To notes and checks left with a bank for collection, the sterner rule applies, for the bank does receive a consideration for transacting the business. When, therefore, they are lost, as sometimes happens, the loser is presumed to be negligent.⁶⁴

16. Liability for Loss of Collaterals.

A similar rule applies to the keeping of collaterals.⁶⁵ The bank has an ample consideration for the risk assumed; and they cannot be perverted from the purpose intended by the pledgor. The same care also must be taken of the securities

47; *Scott v. National Bank*, 72 Pa. 471; *Ray v. Bank*, 10 Bush (Ky.) 344; *United Society of Shakers v. Underwood*, 9 Bush 609; *Gould v. Cayuga Nat. Bank*, 21 Hun (N. Y.) 293. See *Smith v. First Nat. Bank*, 99 Mass. 605.

62 *First Nat. Bank v. Dunbar*, 118 Ill. 625; *United Society of Shakers v. Underwood*, 9 Bush (Ky.) 609; *Hughes v. First Nat. Bank*, 110 Pa. 428; *Prather v. Kean*, 29 Fed. 498, *affd.* 137 U. S. 604; *Merchants' Nat. Bank v. Carhart*, 95 Ga. 394.

63 *White v. Commonwealth Bank*, Fed. Cas. No. 17, 544. See *Comp v. Carlisle Deposit Bank*, 94 Pa. 409.

64 *First Nat. Bank v. First Nat. Bank*, 116 Ala. 520; *Chicopee Bank v. Philadelphia Bank*, 8 Wall. (U. S.) 641. See Chap. XX. §37.

65 *Gray v. Merriam*, 148 Ill. 179; *Jenkins v. National Village Bank*, 58 Me. 275; *Third Nat. Bank v. Boyd*, 44 Md. 47; *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263; *Scott, Williams & Co. v. Crews*, 2 S. C. 522; *Second Nat. Bank v. Smith*, 28 Pa. Leg. Int. 28; *Second Nat. Bank v. Ocean Nat. Bank*, 11 Blatch. (U. S.) 362; *Fleming v. Northampton Nat. Bank*, 62 How. Pr. (N. Y.) 177; *Preston v. Prather*, 137 U. S. 604, *affg.* 29 Fed. 498.

sent by the applicant of a loan even though it is not made.⁶⁶ If he neglected to get them within a reasonable time after the loan had been declined, doubtless the lighter rule of liability would apply.

17. Care Required in Delivery.

A special deposit must be delivered to the rightful person; and a bank is responsible for not exercising due care in this regard.⁶⁷ It must properly examine the certificate of receipt presented by the demander before delivering the property, thus assuring itself that it is making no mistake, either in the property itself, or in the person to whom it is given. An authority, therefore, endorsed on a certificate, to pay the holder the dividend and coupons due on the stocks and bonds described in the instrument, is no authority for delivering the stocks and bonds.⁶⁸

18. Special Deposit is Not an Asset of an Insolvent Bank.

A specific deposit does not pass as an asset of an insolvent bank, and may therefore be fully recovered by the owner;⁶⁹ a special deposit may be demanded and received in some cases as previously explained.

19. Receiving Deposits After Banking Hours.

Though a bank has fixed hours for doing business, it may receive deposits and do other business either before or afterward. On one occasion an individual found the paying teller of a bank within after banking hours and gave a check to him for collection. It was declared that "for all the purposes of the

66 *Bank of Montreal v. White*, 154 U. S. 660. See Chap. VII. §34.

67 *White v. Commonwealth Nat. Bank*, Fed. Cas. No. 17, 544; *Lancaster Nat. Bank v. Smith*, 62 Pa. 47. To prove the ownership of a special deposit of coins, not appearing in the books, the claimant is not obliged to identify them. *Dougherty v. Vanderpool*, 35 Miss. 165.

68 *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369; *Fisk v. Germania Nat. Bank*, 40 La. Ann. 420.

69 *Starr Cutter Co. v. Smith*, 37 Ill. App. 212.

transaction" the bank "adopted him as a necessary teller" and received the check for collection.⁷⁰

On the other hand, business done after or before banking hours may, under some circumstances, be regarded as not having been done at all. Thus, if a note is surrendered after banking hours for a worthless check, which is soon known, and is regained before the opening of the bank the next day, and no prejudice has resulted to the owner from the transaction, he has no claim against the bank for its action.⁷¹

20. Public Deposits.

(a.) Another kind of deposits requiring description are those by public officers. They should be so entered as to show their true nature,⁷² and when they are, by one rule the depositing officer is absolved from loss in consequence of the bank's failure or inability to pay, provided he has exercised proper care in selecting the depositary, and watchfulness of its conduct afterward.⁷³ Nor can he be held liable for violating the

70 *Averell v. Second Nat. Bank*, 6 Mackey (D. C.) 358, second trial, 2 App. Cas. 470. A city treasurer deposited with a bank, after banking hours, as was his custom, funds belonging to the city and to the state. The next morning the portions belonging to the city were separated from the entire amount and placed to his credit. A separation was made one morning as was usual before the hour for opening the bank, but they had not been credited to the treasurer. The bank was insolvent and at the time of doing this was virtually in the possession of the examiner, and was never opened. The fund did not pass to the bank. *City of Phila. v. Eckels*, 98 Fed. 485. A telegram by A bank that C has deposited to B bank's credit \$1,000 for the use of D is not received until after banking hours, and is countermanded the next day before credit has been given to D. B bank is not liable to D for the deposit. *Brinton v. Lewiston Nat. Bank*, 81 Pac. (Idaho) 112.

71 *Interstate Nat. Bank v. Ringo*, 83 Pac. (Kan.) 119. While the courts cannot take judicial notice of the business hours of any particular bank, they judicially know that banks in cities and large towns do not open their doors for business earlier than nine o'clock. *Lewis, Hubbard & Co. v. Montgomery Supply Co.*, 52 S. E. (W. Va.) 1017.

72 *Hunt v. Hopley*, 120 Iowa 695; *Officer v. Officer*, 120 Iowa 389; *Williams v. Williams*, 55 Wis. 300.

73 *Baker v. Williams Bkg. Co.*, 42 Or. 213, 223; *In re Law's Estate*, 144 Pa. 499; *State v. McFetridge*, 84 Wis. 473; *Roberts v. Board of Co. Comms.*, 8 Wy. 177. A receiver may deposit funds in a bank of good re-

law forbidding loans, or regulating the making of them, in depositing the public funds in a bank on the ground that it is a loan, and contrary to law.⁷⁴ But an officer who disregards this plain legal requirement is absolutely responsible for their safe keeping and return, even though he would have kept them in the same bank had he obeyed the law.⁷⁵ This is an appropriate penalty to inflict on him for his disobedience.

(b.) By the older and far more general rule, which in some states has been transformed into a statute, a public officer is an insurer, and liable in every event for the loss of the public deposits entrusted to his keeping. Wherever this rule prevails, therefore, no precaution, no character for stability won by the depository, will release him from liability.⁷⁶ In any case, should the bank fail, and the officer make the loss good, the deposit would become his property.⁷⁷

(c.) The departure from the older and more general rule is quite recent, and in some states has been established by statute or municipal ordinance. If this require the deposit to be kept in a "regularly organized bank," a state or national bank

pute. *State v. Corning State Sav. Bank*, 105 N. W. (Iowa) 159; *Officer v. Officer*, 120 Iowa 389; *Terrell v. Terrell*, 69 N. C. 59; *Barton v. Ridgeway*, 92 Va. 162. In doing so he must exercise the prudence exercised by reasonably cautious men in their own affairs. *State v. Corning State Sav. Bank*, 105 N. W. 159. That the bank is a creditor of the insolvent is no objection. *Ibid.* Nor can the bank apply such a deposit against its claim owing by the insolvent represented by the receiver. *Ibid.*

74 *Hunt v. Hopley*, 120 Iowa 695; *State v. Rubey*, 77 Mo. 610; *Baker v. Williams Bkg. Co.*, 42 Or. 213; *Allibone v. Ames*, 9 S. Dak. 74.

75 *Shaw v. Bauman*, 34 Ohio St. 25; *Ringo v. Field*, 6 Ark. 43.

76 *United States v. Prescott*, 3 How. (U. S.) 578; *United States v. Morgan*, 11 How. 154; *United States v. Dashiell*, 4 Wall. (U. S.) 182; *United States v. Keebler*, 9 Wall. (U. S.) 83; *Boyden v. United States*, 13 Wall. 17; *Montgomery Co. v. Cochran*, 57 C. C. A. 261; *Alston v. State*, 92 Ala. 124; *Muzzy v. Shattuck*, 1 Denio (N. Y.) 233; *Tillinghast v. Merrill*, 77 Hun (N. Y.) 481; *State v. Harper*, 6 Ohio St. 607; *Estate of Ramsay v. People*, 197 Ill. 572; *Commonwealth v. Comly*, 3 Pa. 372; *People v. Wilson*, 117 Cal. 242; *Lamb v. Dart*, 108 Ga. 602, 611; *Van Trees v. Territory of Okla.*, 7 Okla. 353, contains an elaborate review of authorities, showing that twenty-one states follow this rule. But see *Thompson v. Territory of Okla.*, 10 Okla. 409.

77 *Baker v. Williams Bkg. Co.*, 42 Or. 213.

must be selected, and not a private banker.⁷⁸ And if the officer receives interest on the deposit, which he retains contrary to law, the bank becomes a participant in the wrong, and responsible therefor.⁷⁹

In general, a public officer who in depositing the public money that comes into his possession is instructed by a statute or ordinance must follow its provisions. His duty in this regard is ministerial and not discretionary, and he must faithfully comply or he will be liable for the consequences.⁸⁰ And "if an officer is required or authorized by law to make deposits in any particular place, or with any particular person, he is usually, if not universally, protected from further responsibility, so long as he leaves it there, and is not a guarantor of the safety of the deposit."⁸¹

(d.) By statute, a bank may act as a depository of public funds. It is often required to give a bond for the faithful performance of its duty, which is a continuing obligation that can be discharged only by paying out the funds in accordance with its terms.⁸² A bank, therefore, which keeps the deposit of a county treasurer, who, on retiring from office, gives his suc-

78 *City of DuQuoin v. Kelly*, 176 Ill. 218. And if one of the sureties on the officer's bond was a banker in whose bank the money was lost, he may not for that reason be liable on the bond. *Roberts v. Board of Co. Comrs.*, 8 Wy. 177. But he may be responsible independently as though he were not a surety and the money may be recovered in a proper action. *Ibid.* If county deposits are kept with a private banker, contrary to law, this is no defence in an action by the county on the bond. *Buhrer v. Baldwin*, 137 Mich. 263. In Ohio a statute requiring boards of education to deposit money with banks includes a partnership. *State v. Madison Township*, 15 Ohio Dec. 720.

79 *American Bonding Co. v. National Mech. Bank*, 97 Md. 598.

80 *City of New Haven v. Fresenius*, 75 Conn. 144. The city was not limited to an action on the treasurer's bond, but had a concurrent remedy in an action to recover damages caused by his breach of duty. *Ibid.*

81 *Perley v. County of Muskegon*, 32 Mich. 132, 136.

82 *County of Hall v. Thomssen*, 63 Neb. 787; *Buhrer v. Baldwin*, 100 N. W. (Mich.) 468. See *In re State Treasurer's Settlement*, 51 Neb. 116. Such a bond is valid as a common law bond, though not technically conforming to the statute. *Buhrer v. Baldwin*, 100 N. W. (Mich.) 468.

cessor a certified check, is liable therefor.⁸³ Furthermore, if a statute provides that the public funds of a county shall be deposited in the different banks therein, in due proportions, the county treasurer may be compelled by mandamus to comply with the law.⁸⁴

Though no such relation has been created by statute, the state, county or other municipality owning the deposit, may maintain an action to recover a deposit belonging to the public unlawfully deposited by a public officer.⁸⁵ Furthermore, to estop a bank from denying a statement concerning the amount of deposits belonging to a county treasurer to a committee appointed to examine his accounts, the committee must have been influenced thereby to take, or omit to take, action in consequence of the representation.⁸⁶

(e.) The depository has a clear duty to perform in the way of preventing a misuse of money by the depositor. It is clearly responsible for knowingly or negligently permitting him to withdraw by private check or other method, public money for his own use.⁸⁷ And should he do this and afterward make a deposit, to cover his shortage, the bank cannot divert it to pay a private debt due from the depositor.⁸⁸

(f.) There are two series of questions growing out of public deposits, one between the depositor and the public owner; the other between the depositor and the bank. Often he has opened an account in his individual name wherein his own and the public funds have been mingled. Again, he has attached the title of his office to his own name, though the account was purely his own. The courts have become strangely befogged by such conduct, and in trying to render justice have delivered

83 Ibid.

84 *State v. Cronin*, 101 N. W. (Neb.) 325.

85 *Farmers' & Merch. Bkg. Co. v. City of Red Cloud*, 62 Neb. 442, overruling *State v. Keim*, 8 Neb. 63. A contract between a city and a private banker for the receiving, safe keeping and payment of funds is not assignable. *City of Marquette v. Wilkinson*, 119 Mich. 413.

86 *Anderson v. Walker*, 93 Tex. 119.

87 *United States v. National Bank*, 73 Fed. 897.

88 Ibid.

some utterances not creditable to their understanding. In all cases as between him and the true owner, the state, municipality, successor in office, or other person who is legally entitled to them, may demand them and prove title thereto, whatever may be the form of the account.⁸⁹ If they are standing in his official name, we think that this would be *prima facie* evidence of their ownership; if in his individual name, more proof of their public ownership would be required.

The other question relates to the use and retention of such deposits as between bank and depositor. In a recent case the old rule was repeated that the addition of curator, collector and the like are to be regarded merely as a *descriptio personæ*, containing no authentic knowledge of the money deposited.⁹⁰ Consequently a person who served as administrator and added this designation to his name gave the bank no authentic knowledge of the real ownership of the funds he deposited, and therefore it was justified in regarding all as his own, and in applying the deposit to discharge his indebtedness to the bank. This is a desirable way of regarding the deposit from the bank's side, but is it correct? This important and difficult question has been elsewhere considered, but further answer is justified by reason of its every-day occurrence.

It is clearly settled that a trustee cannot use a trust fund to pay his private indebtedness to the bank; on the other hand, he can, and often does, use it to pay his indebtedness to others. Unquestionably a bank is not the guardian of the deposit in the sense that it must watch over its disposition by the trustee. Therefore, if he uses it to pay debts to others, and the bank has no reason to suppose he is perverting his trust, it has no right to decline to honor his checks, although it clearly could not take them to pay itself.⁹¹ The reason, though, is obvious. It knows that he has no right to thus use the funds, while in paying others it does not know what he is doing.

⁸⁹ *Lewis v. Park Bank*, 42 N. Y. 463; *Vasant v. State*, 96 Md. 110.

⁹⁰ *Sparrow v. State Ex. Bank*, 103 Mo. App. 338; *Eyerman v. Second Nat. Bank*, 13 Mo. App. 289, *affd.* 84 Mo. 408.

⁹¹ *Duckett v. National Mech. Bank*, 86 Md. 400.

But it is, we think, not without a duty in this regard. Clearly, if it knows that he is misappropriating the funds, it has no right to aid him, for in so doing it becomes a partner in his misdoing. But how far will a suspicion justify a bank in withholding payment? This is a difficult question that cannot be easily answered. Perhaps each case must stand by itself.

Again, while a trustee cannot thus use trust funds directly to pay his debts, it can accomplish the same thing in another way. It has been decided on several occasions that a trustee can withdraw money from the trust account and deposit it to his private account.⁹² In other words, he can pay himself for his services, and the law justifies him in doing this. Having transferred the funds to his private account, of course, he can make any use of them he pleases.

Can, or ought the law to impose any check on this practice? The law can hardly require a bank to interrogate him every time he gives a check, or rather the presentor. Can the law require him to explain the purpose of every check drawn payable to himself? We have seen that the law will not permit a cashier to use his official position to certify his own check, except under the most unquestioned circumstances. Why not? Because of the danger? Is the power now exercised by a trustee within his narrower field, less dangerous, to permit him to pay himself without action or sanction by any tribunal? Ought he to be permitted without due authority from a proper source to exercise such a dangerous power? and would it be unreasonable to require him to make a satisfactory explanation to the depository in such a case?

21. Deposits of Executors and Administrators.

(a.) An executor or administrator, as we have seen,⁹³ has authority to deposit money coming into his possession in a reputable bank until he has properly relieved himself in due course of administration.⁹⁴ Having done so, he would not be respon-

⁹² Safe Dep. & Trust Co. v. Diamond Nat. Bank, 194 Pa. 334.

⁹³ Chap. VI. §4.

⁹⁴ Harding v. Canfield, 73 Minn. 244. A guardian who uses due care

sible for a loss, unless he could be charged with negligence in not learning of the bank's irresponsibility.⁹⁵

(b.) He should pay over the money within a reasonable period after receiving it, and he and his sureties may be held responsible for not observing this well-founded rule.⁹⁶ Had it always been observed, many an executor would have been spared the shame and loss arising from his neglect. There are circumstances that may justify his delay; while others urged as a justification have proved inadequate. Thus the failure of the bank in which he had deposited the estate's money while using his own to pay debts is no defence, for, if he had paid the money out, it would not have been lost.⁹⁷ Furthermore, he clearly transgresses the law when, instead of depositing the money payable on demand, he lends it for a year, thereby putting it beyond his control.⁹⁸

On the other hand, the retention of a deposit by an executor while awaiting the result of a legal conflict over the will under

in depositing his ward's funds in a bank regarded as solvent for a reasonable time until he can invest them with judicial authority, is not liable for a loss caused by a bank's failure. *Murph v. McCullough*, 90 S. W. (Tex. Civ. App.) 69. But if he should deposit them in such a bank for a fixed period without legal order and thereby suspend his right to withdraw them during that period he would be liable for their loss. *Ibid*.

95 *Officer v. Officer*, 120 Iowa 389; *In re Law's Estate*, 144 Pa. 499; *Norwood v. Harness*, 98 Ind. 134; *Jacobus v. Jacobus*, 37 N. J. Eq. 17, and note to other cases; *Cox v. Roome*, 38 N. J. Eq. 259; *People v. Faulkner*, 107 N. Y. 477; *Barney v. Saunders*, 16 How. (U. S.) 535; *Sheerin v. Public Adm.*, 2 Red. Surr. (N. Y.) 421; *Matter of Maxwell*, 23 Abb. N. C. (N. Y.) 23; *Estate of Seidler*, 5 Phila. 85; *Robinson's Appeal*, 2 Walk. (Pa.) 544; *Hanbest's Appeal*, 92 Pa. 482; *In re Seymour's Estate*, 43 Pa. Leg. Int. 58; *Fitzsimmons v. Fitzsimmons*, 1 Rich. (S. C.) 400; *Twitty v. Howser*, 7 Rich. (S. C.) 153. The test of a trustee in depositing funds is "whether he exercised that degree of care which men of common prudence ordinarily exercise in their own affairs." *Harding v. Canfield*, 73 Minn. 244, 246. Whether a trustee was negligent in continuing a fund in an Illinois bank, see *Penn v. Fogler*, 77 Ill. App. 365, 391.

96 *Mandeville v. Arnoult*, 9 Rob. (La.) 447; *Wood v. Myrick*, 17 Minn. 408; *McNabb v. Wixom*, 7 Nev. 163; *Woodley v. Holley*, 111 N. C. 380.

97 *Guthrie v. Wheeler*, 51 Conn. 207.

98 *Baer's Appeal*, 127 Pa. 360.

which he was acting;⁹⁹ or while waiting the demand of a duly qualified recipient;¹ or awaiting vouchers or proper security before making payment;² or who retains them by virtue of a legal order until their legal distribution is judicially determined;³ or who makes a deposit in a bank with the knowledge of the parties interested;⁴ on such occasion the executor's conduct is justified.

(c.) In some states, statutes provide how an executor shall deposit money while it is in his control, both with the view to its safety and to earning an income.⁵ In others, the courts having the especial settlement of estates can direct the mode or terms of deposit by the executor,⁶ and their order must be regarded.⁷

(d.) An executor for many reasons should put the deposit in his official name; if he does not, no excuse will relieve him of the loss.⁸ Nor will the bank's knowledge of its ownership lessen the liability.⁹

(e.) If he deposit the money in bank, together with money of his own, so that he may draw against the common fund in his own name, or in any manner mingle it with his own, this

99 *Guthrie v. Wheeler*, 51 Conn. 207.

1 *Jacobus v. Jacobus*, 37 N. J. Eq. 17.

2 *Cox v. Roome*, 38 N. J. Eq. 259.

3 *Twitty v. Howser*, 7 Rich. (S. C.) 153.

4 *Fitzsimmons v. Fitzsimmons*, 1 Rich. (S. C.) 400; *Matter of Maxwell*, 23 Abb. N. C. (N. Y.) 23.

5 *Succession of Pasquier*, 11 La. Ann. 279; *Succession of Peytavin*, 7 Rob. (La.) 478.

6 See *Reed v. Crocker*, 12 La. Ann. 445; *Succession of Williams*, 22 La. Ann. 94; *Ex parte Shipley*, 4 Md. 493; *Estate of Gilman*, 41 Hun (N. Y.) 561; *In re O'Connor's Estate*, 1 N. Y. Supp. 110.

7 *Ibid.*

8 *Williams v. Williams*, 55 Wis. 300; *Summers v. Reynolds*, 95 N. C. 404; *Payne v. Horner*, 66 Mo. App. 531; *Harward v. Robinson*, 14 Ill. App. 560; *Allen v. Leach*, 29 At. (Del.) 1050; *Succession of Legarde*, 20 La. Ann. 148; *Vaiden v. Stubblefield*, 28 Gratt. (Va.) 153; *Commonwealth v. McAlister*, 28 Pa. 480; *In re Arquello's Estate*, 97 Cal. 196; *Officer v. Officer*, 120 Iowa 389, 391; *Corya v. Corya*, 119 Ind. 593; *Naltner v. Dolan*, 108 Ind. 500, 505.

Contra.—*Atterbury v. McDuffie*, 31 Mo. App. 603.

9 *Harward v. Robinson*, 14 Ill. App. 560.

is a conversion of the estate's money to his own use;¹⁰ the loss of the fund through the failure of the bank or otherwise he must sustain.¹¹ Of course he is liable for wrongfully retaining the money himself.¹²

22. Interest.

Interest by agreement is allowed almost everywhere on special deposits; and sometimes on deposits payable on demand. If no agreement exists, interest cannot be collected¹³ until after payment has been demanded and refused.¹⁴ But if, after refusal, the depositor withdraws his money without interest, none can afterward be collected.¹⁵ This is based on the principle that whenever there is no agreement to pay interest it is strictly incidental to the debt and cannot exist after its discharge.¹⁶ Again, if there should be unreasonable or vexatious delay in paying a deposit, interest may be recovered.¹⁷ But the defending in good faith of a suit for the recovery of a deposit is not a vexatious delay.¹⁸

23. Running of Statute of Limitations Against Deposits.

The rules differ in the running of the statute of limitations

¹⁰ *Union Bank v. Smith*, 4 Cranch C. C. (U. S.) 509, 511; *Ivey v. Coleman*, 42 Ala. 409, 415; *Officer v. Officer*, 120 Iowa 389, 391.

¹¹ *Harward v. Robinson*, 14 Ill. App. 560; *Summers v. Reynolds*, 95 N. C. 404; *Williams v. Williams*, 55 Wis. 300; *In matter of Arguello*, 97 Cal. 196; *Horner's Estate*, 66 Mo. App. 531; *Corya v. Corya*, 119 Ind. 593; *Ditmar v. Bogle*, 53 Ala. 169, 170; *Woerner's Am. Law of Administration*, §336, p. 705.

¹² *Succession of Caballero*, 25 La. Ann. 646; *Succession of Hogan*, 26 La. Ann. 567.

¹³ *First Nat. Bank v. Coleman*, 11 Ill. App. 508, 511; *Parsons v. Treadwell*, 50 N. H. 356; *Atlanta Nat. Bank v. Burke*, 87 Ga. 597, 601.

¹⁴ *Parkesburg Nat. Bank v. Als*, 5 W. Va. 50; *Allgear v. Walsh*, 24 Mo. App. 134; *Swallow v. Duncan*, 18 Mo. App. 622; *Arnold v. Sedalia Nat. Bank*, 100 Mo. App. 474. See Chap. XVI. §21.

¹⁵ *Arnold v. Sedalia Nat. Bank*, 100 Mo. App. 474.

¹⁶ *Graves v. Saline County*, 43 C. C. A. 414; *Sedgwick on Damages*, §338.

¹⁷ *First Nat. Bank v. Coleman*, 11 Ill. App. 508, 511; *Jasoy v. Horn*, 64 Ill. 379.

¹⁸ *Aldrich v. Dunham*, 16 Ill. 403.

against a deposit. As a deposit is a loan, the statute providing for money lent should be applied.²⁰ By one rule the statute begins to run in favor of the bank as soon as the deposit is made;²¹ by the other, not until after the owner has demanded its return.²² And whenever a bank suspends payment of deposits, the statute begins to run from the date of suspension.²³

A different rule applies to an agent to whom a deposit has been paid by a bank supposing it could rightfully do so, but which in truth is a fraud on the principal. To the agent the rule is applied that governs in all cases of fraud, the statute begins to run only from the date of its discovery.²⁴

19 *Phoenix Bank v. Risley*, 111 U. S. 125, 127; *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 288; *New York Co. Bank v. Massey*, 190 U. S. 138, 145.

20 *Pott v. Clegg*, 16 Mees. & Wels. (Eng.) 320; *Schinotti v. Whitney*, 130 Fed. 780.

21 *Wells v. Black*, 117 Cal. 157; *Hunt v. Ward*, 99 Cal. 612; *Bank v. Pacific Coast Steamship Co.*, 103 Cal. 594.

22 *Hagmayer v. Farley*, 23 N. Y. App. Div. 426; *Schinotti v. Whitney*, 130 Fed. 780; *Brown v. Pike*, 34 La. Ann. 577.

23 *Schinotti v. Whitney*, 130 Fed. 780.

24 *City Sav. Bank v. Enos*, 135 Cal. 167.

CHAPTER XIV.

CERTIFICATES OF DEPOSIT.

- | | |
|---|---|
| 1. Definition and purpose. | 9. Interest. |
| 2. Is it a note or receipt? | 10. Duration of certificate. |
| 3. Contract is governed by ordinary rules of evidence. | 11. Effect of renewal. |
| 4. Construction of them. | 12. Defences. |
| 5. Other forms of certificate, payable to trustee. | 13. When is a certificate a loan? |
| 6. Endorsement. | 14. Effect of certificate given by insolvent bank. |
| 7. When is certificate due? | 15. Assignment of certificate after issuing bank's failure. Interpleader. |
| 8. Duty of holder in demanding payment; lost certificate. | |

1. Definition and Purpose.

A certificate of deposit may be defined as "a written acknowledgment by a bank or banker of the receipt of a sum of money on deposit, which the bank or banker promises to pay to the depositor, to the order of the depositor, or to some other person or to his order, and its form must determine its negotiability."¹ This, instead of a pass-book, is given to a person who wishes to make a single deposit of money. The certificate may be payable on demand; more usually it is payable on time. Their issue, once restricted or forbidden in some states,² is now everywhere lawful.

¹ *Bank v. Farnsworth*, 18 Ill. 563. See *Bank v. Merrill*, 2 Hill (N. Y.) 295; *Leavitt v. Palmer*, 3 N. Y. 19; *Hazleton Coal Co. v. Megargel*, 4 Pa. 324; *Darden v. Banks*, 21 Ga. 297. An agreement between the cashier and holder of a certificate that he can check against the amount is not within the statute of frauds. *Hamlin v. Simpson*, 105 Iowa 125. A bank having a nominal capital of \$25,000, an indebtedness of \$15,000 and \$21,000 of assets, issued certificates of deposit to its stockholders for \$12,500 and \$12,500 of new capital to take up the other. The certificates were held to be without consideration as against the receiver. *State v. Bank*, 65 Neb. 20.

² *Abbott v. Jack*, 136 Cal. 510; *Murphy v. Pacific Bank*, 119 Cal. 334.

2. Is it a Note or Receipt?

In three states, perhaps more, a certificate is merely a receipt,³ therefore is non-negotiable, and transferable only by the rules that apply to non-negotiable paper. An action thereon must be brought in the same manner,⁴ to which the same defences can be made, as on other non-negotiable paper.⁵ In far more states a certificate, except that of a clearing-house,⁶ is like a promissory note, negotiable, and can be transferred like other negotiable paper.⁷ Often it is negotiable by delivery;⁸ or by endorsement and delivery, like other negotiable paper.⁹ The holder of a certificate endorsed in blank can fill in his own name as

341; *Hargroves v. Chambers*, 30 Ga. 580; *Hunt v. Divine*, 37 Ill. 137; *Pelham v. Adams*, 17 Barb. (N. Y.) 384; *Curtis v. Leavitt*, 15 N. Y. 9; *Logan Nat. Bank v. Williamson*, 2 Ohio C. Ct. 118; *State v. Shove*, 96 Wis. 1, 6.

3 *Shute v. Pacific Nat. Bank*, 136 Mass. 487; *Dempsey v. Harm*, 7 Sad. (Pa.) 426; *First Nat. Bank v. Greenville Nat. Bank*, 84 Tex. 40.

4 *Loudon Sav. Fund Society v. Hagerstown Sav. Bank*, 36 Pa. 498.

5 *First Nat. Bank v. Greenville Nat. Bank*, 84 Tex. 40. See also *Renfro v. Merchants' & Mech. Bank*, 83 Ala. 425.

6 This clearly falls within the category of a receipt. *Dutton v. Merchants' Nat. Bank*, 16 Phila. 94.

7 *Renfro v. Merchants' & Mech. Bank*, 83 Ala. 425; *Kirkwood v. First Nat. Bank*, 40 Neb. 484; *Poorman v. Mills*, 35 Cal. 118; *Brummagin v. Tallant*, 29 Cal. 503; *Lynch v. Goldsmith*, 64 Ga. 42; *Bickley v. Commercial Bank*, 43 S. C. 528, 533; *Gregg v. Union Co. Nat. Bank*, 87 Ind. 238; *Long v. Strauss*, 107 Ind. 94; *First Nat. Bank v. Stapf*, 74 N. E. (Ind.) 987; *Bean v. Briggs*, 1 Iowa 488; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580; *Pardee v. Fish*, 60 N. Y. 265; *Smiley v. Fry*, 100 N. Y. 262; *Bank v. Merrill*, 2 Hill (N. Y.) 295; *Hanna v. Manufacturers' Trust Co.*, 104 N. Y. App. Div. 90; *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377; *Klauber v. Biggerstaff*, 47 Wis. 551, 555; *Miller v. Austen*, 13 How. (U. S.) 218; *Citizens Nat. Bank v. Brown*, 45 Ohio St. 39; *Hatch v. First Nat. Bank*, 94 Me. 348; *Dietrich v. Rothenburger*, 75 S. W. (Ky.) 271; *Mitchell v. Easton*, 37 Minn. 335; *Re Central Bank*, 17 Ont. (Can.) 574. See 42 Am. Dec. 576. Nor is its negotiability destroyed by stipulations that it is payable on its return properly endorsed, or in current funds, or that it shall bear interest if left six months. *Kirkwood v. First Nat. Bank*, 40 Neb. 484. But a certificate issued by a trust company payable to the depositor and "her assigns, on return of this certificate," is not negotiable. *Zander v. N. Y. Security & Trust Co.*, 178 N. Y. 208, affg. 81 App. Div. 635.

8 *Shanklin v. Board of Com. of Madison Co.*, 21 Ohio St. 575.

9 *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39; *Kirkwood v. First Nat. Bank*, 40 Neb. 484.

payee;¹⁰ and a certificate made payable to the depositor or order on its return properly endorsed is negotiable without the depositor's endorsement.¹¹ A person, therefore, to whom it has been delivered can demand the money after endorsing the certificate.¹² Again, the negotiability of a certificate is not affected by making it payable in current funds instead of money,¹³ nor by the endorsement of an individual at the time of issuing it for the purpose of giving it greater credit.¹⁴ Lastly, the holder can sue in his own name to recover the amount.¹⁵ Wherever this rule prevails, certificates are governed by essentially the same principles as other negotiable paper, and are protected against the same defences.¹⁶ As these instruments are often endorsed, a surety or an endorser may be held as he is on other negotiable paper.¹⁷

3. Contract is Governed by Ordinary Rules of Evidence.

The certificate is a contract to which the same rules of evidence should be applied as to any other written contract. The agreement is merged in the writing. Its legal effect, therefore, cannot be varied by parol evidence,¹⁸ for example, by showing that interest was to be paid though the certificate was

10 *Weirick v. Mahoning Co. Bank*, 16 Ohio St. 296.

11 *Cassidy v. First Nat. Bank*, 30 Minn. 86. See *Foster v. Berkey*, 8 Minn. 351.

Contra.—*First Nat. Bank v. Greenville Nat. Bank*, 84 Tex. 40.

12 *Ibid*.

13 *Hatch v. First Nat. Bank*, 94 Me. 348, citing many cases; *Bull v. Bank*, 123 U. S. 105; *National State Bank v. Ringel*, 51 Ind. 393; *Kirkwood v. First Nat. Bank*, 40 Neb. 484.

Contra.—*Huse v. Hamblin*, 29 Iowa 501.

14 *In re Baldwin's Estate*, 170 N. Y. 156.

15 *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39.

16 *Huse v. Hamblin*, 29 Iowa 501; *Rindskoff v. Barrett*, 11 Iowa 172; *Piner v. Clarey*, 17 B. Mon. (Ky.) 645; *Shankland v. Madison Co. Comrs.*, 21 Ohio St. 575; *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39; *Howe v. Hartness*, 11 Ohio St. 449; *Dietrich v. Rothenberger*, 75 S. W. (Ky.) 271.

17 *In re Baldwin's Estate*, 170 N. Y. 156.

18 *Long v. Strauss*, 107 Ind. 94; *Citizens' Bank v. Jones*, 121 Cal. 30.

silent on the matter;¹⁹ but may be used to establish a subsequent agreement.²⁰

4. Construction of Them.

A frequent form of contract is one payable on demand or after a fixed date to the depositor, or to his order, "on the return of the certificate properly endorsed." This is generally regarded as negotiable,²¹ and payable on the endorsement of the holder or presentor, without that of the depositor;²² but in some states it is not commercial paper in the fullest sense, lacking some of the elements of certainty, and may be subject to set off subsequent to its transfer.²³

It has been said that such a certificate does not require the holder to present it at the issuing bank for payment, as it contains no promise to pay there; that it is the maker's duty to find the holder and pay him.²⁴ This is not a reasonable interpretation. The phrase, "on return of" the certificate evidently means that the holder must return it to the bank, and this doubtless has been the uniform practice from the beginning.²⁵

19 Read v. Bank, 124 N. Y. 671, affg. 55 Hun 154.

20 Woods v. Russell, 1 Sad. (Pa.) 41.

21 Cassidy v. First Nat. Bank, 30 Minn. 86; Hatch v. First Nat. Bank, 94 Me. 348, 353; Auten v. Crahan, 81 Ill. App. 502. See Springfield Marine Ins. Co. v. Peck, 102 Ill. 265.

Contra.—First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40.

22 Ibid.

23 Renfro v. Merchants' & Mech. Bank, 83 Ala. 425. Other cases of certificates similarly written are Washington Bank v. Wash. Co. Nat. Bank, 5 Hun (N. Y.) 605; Tripp v. Curtenius, 36 Mich. 494; National State Bank v. Ringel, 51 Ind. 393.

24 Hunt v. Divine, 37 Ill. 137. See Bank v. Harrison, 66 Pac. 460.

25 Sanbourn v. Smith, 44 Iowa 152; Lynch v. Goldsmith, 64 Ga. 42, 50. Said Bleckley, J., in this case: "What is a certificate of general deposit issued by a bank? Is it not an acknowledgment of the bank that it has received a loan of money from the depositor coupled with a promise implied, if none be expressed, that it will repay the loan at the bank upon actual demand or call, if no particular time or place be specified. Does not the known course of business require this construction, and does not the nature of the transaction suggest it?" A certificate of deposit is more than a deposit. Talcott v. First Nat. Bank, 53 Kan. 480, 484; Long v. Strauss, 107 Ind. 94.

5. Other Forms of Certificate Payable to Trustee.

A certificate made payable at the depositor's request to another person still remains his property until it is delivered.²⁶ And a certificate payable to order within twelve months from date, or six months if desired, does not mature until the end of the year.²⁷ Again, a certificate stating that on a prior date a party had a specified sum on deposit to his credit, without any words of negotiability or promise to pay, is not an obligation on which an action can be maintained; "it is merely evidentiary in its character."²⁸ Lastly, the holder of a certificate issued on a condition is not entitled to the deposit without complying with the condition. When, therefore, the condition after due time is not fulfilled, the depositor can recover the deposit, although he is not in possession of the certificate by reason of the holder's failure or unwillingness to re-endorse it to him.²⁹

Sometimes a certificate is made payable to one as trustee. This is an express notice to a purchaser that there is a beneficiary, and that his rights cannot be sacrificed by the trustee in the sale or pledge of the certificate for his own benefit. In other words, whoever takes a security from a trustee with the fiduciary character displayed upon its face is bound to inquire into his right to dispose of it.³⁰ Nor is an innocent purchaser protected by any provision of the Negotiable Instruments Law.³¹

6. Endorsement.

The endorsement will next be considered. The bank must pay to any endorsee to whom the certificate is properly en-

26 *Farmers' & Merch. State Bank v. Gleason*, 75 Ill. App. 251; *Telford v. Patton*, 144 Ill. 611. See *Williams v. Chamberlain*, 165 Ill. 210.

27 *Citizens' Bank v. Jones*, 121 Cal. 30. The alternative is for the benefit of the payee, who is not required to present it for payment at the end of the shorter period in order to hold the endorser. *Ibid.*

28 *Modern Woodmen v. Union Nat. Bank*, 47 C. C. A. 667.

29 *McGorray v. Stockton Sav. Society*, 131 Cal. 321.

30 *Ford v. Brown*, 88 S. W. (Tenn.) 1036; *Bank v. Looney*, 99 Tenn. 278, 290; *Third Nat. Bank v. Lange*, 51 Md. 138. See *Fox v. Citizens' Bank & Trust Co.*, 37 S. W. (Tenn. Ch. App.) 1102.

31 *Ford v. Brown*, 88 S. W. (Tenn.) 1036.

dorsed.³² And the payee who transfers it by a blank endorsement is liable like any other blank endorser.³³ But, as an endorsement in blank payable to the depositor's order before delivery is an original promise, the endorser is not entitled to demand any notice.³⁴ And a certificate payable on its return properly endorsed may be presented and payment demanded without endorsement by the attorney of the payee.³⁵ Even if "Not transferable" be written across the face of a certificate, the depositor can assign his claim against the bank for the money deposited.³⁶ Again, a bank is not required in paying a certificate that has been transferred by endorsement to ascertain whether the endorsement was made in good faith.³⁷ Lastly, though made payable to the order of the depositor, it may be transferred without endorsement to a transferee who was the real owner of the money deposited, who can maintain an action thereon in his own name.³⁸

7. When is Certificate Due?

A certificate is not due until demand,³⁹ or a sufficient time has elapsed to raise a presumption that the instrument is past due, duly regarding the way in which the business of the bank is ordinarily transacted.⁴⁰ Furthermore, a presumption of payment arises only after the running of the statute of limitations.⁴¹ Until then, the presumption is one of fact, and not of law.⁴²

32 *Hanna v. Manufacturers' Trust Co.*, 104 N. Y. App. Div. 90.

33 *Bean v. Briggs*, 1 Iowa 488.

34 *Scanlan v. Porter*, 64 Ark. 470.

35 *Cornwall v. McKinney*, 12 S. Dak. 118.

36 *In re Commercial Bank*, 11 Manitoba 494.

37 *Springfield Marine Ins. Co. v. Peck*, 102 Ill. 265.

38 *Pease v. Rush*, 2 Minn. 107; *Cassidy v. First Nat. Bank*, 30 Minn. 86.

39 *Pardee v. Fish*, 60 N. Y. 265; *Cottle v. Marine Bank*, 166 N. Y. 53; *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377. See §10.

40 *Auten v. Crahan*, 81 Ill. App. 502.

41 *Boughton v. Flint*, 74 N. Y. 476; *Bean v. Tonnele*, 94 N. Y. 381; *Rosenstock v. Dessar*, 85 N. Y. App. Div. 501.

42 *Ibid*; *Zebley v. Farmers' Loan & Trust Co.*, 139 N. Y. 461.

8. Duty of Holder in Demanding Payment. Lost Certificate.

The holder, when demanding payment, must present the certificate to the bank, for this is required by the contract,⁴³ unless the bank is closed; then it should be presented to the receiver.⁴⁴

Though lost, he is rightfully entitled to his money after proving the loss of the certificate and giving a bond of indemnity, but the bank can rightfully refuse payment unless this is done.⁴⁵ Indeed, though in the possession of another, from whom the payee is unable to obtain it, he cannot require the bank to pay without fulfilling this requirement.⁴⁶ His proper course is to sue both bank and possessor, demanding the certificate from the latter, and its payment on surrender thereof by the bank. Furthermore, in such an action he can recover damages for the detention of the certificate,—a sum equal to the legal interest from the date of demand and refusal until the time of its recovery.⁴⁷

To this rule a qualification may be made of a lost certificate payable to order that has not been endorsed,⁴⁸ or that has been

43 *Fells Point Sav. Institution v. Weedon*, 18 Md. 320; *Hyland v. Roe*, 111 Wis. 361. A time certificate issued after the dissolution of a banking partnership by the successor in place of a certificate issued by the old firm is not a payment of the firm debt unless the creditor agrees to receive it as payment. *Chase v. Brundage*, 58 Ohio St. 517. A certificate was made payable to the depositor "with interest if left three months." The payee endorsed and transferred it before the end of three months with a special request not to transfer it until afterward. In accordance with this request it was not presented until the day afterward, meantime the bank had failed. The original payee could not escape liability to the holder on the ground that the presentment was not in due time. *Cate v. Patterson*, 25 Mich. 191.

44 *Ballard v. Burton*, 64 Vt. 387.

45 *Dutton v. Merchants' Nat. Bank*, 16 Phila. 94; *Fells Point Sav. Institution v. Weedon*, 18 Md. 320; *Welton v. Adams*, 4 Cal. 37; *Price v. Dunlap*, 5 Cal. 483; *Randolph v. Harris*, 28 Cal. 561; *Bank v. Little*, 17 Grant's Ch. Cases (Can.) 685. See *Zang v. Wyant*, 25 Colo. 551.

46 *Read v. Marine Bank*, 136 N. Y. 454, revg. 63 Hun 624.

47 *Sleppy v. Bank*, 17 Fed. 712.

48 *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39; *Kirkwood v. First Nat. Bank*, 40 Neb. 484.

Contra.—*First Nat. Bank v. Wilder*, 104 Fed. 187.

lost after maturity;⁴⁹ or that is non-negotiable.⁵⁰ In either case no bond is required for the protection of the bank against a second payment of the certificate.

9. Interest.

The certificate generally bears interest. Should payment, for any reason, be refused at maturity, the certificate bears the same rate of interest as before.⁵¹ If not then presented for payment, interest will continue;⁵² if presented earlier, the presenter thereby waives his right to demand interest.⁵³ After the maturity of the certificate, the bank may insist on payment, or may reduce the future rate of interest by giving proper notice of its intention.⁵⁴

10. Duration of Certificate.

The duration of a certificate of deposit has greatly divided judicial opinion. To give a more effective answer certificates should be divided into two classes: (a) Those payable on demand; (b) those payable on time. The larger number of controversies has arisen over the certificate first mentioned, though they are less frequently given; these, therefore, will be first considered.

Three constructions are put on a demand certificate: (a) In some states they are due immediately, an action thereon

49 *Kirkwood v. First Nat. Bank*, 40 Neb. 484.

50 *Zander v. N. Y. Security & Trust Co.*, 178 N. Y. 208, affg. 81 App. Div. 635.

51 *Payne v. Clark*, 23 Mo. 259; *Cordell v. First Nat. Bank*, 64 Mo. 600. A certificate of deposit payable on demand after a stated period contained a stipulation that it should not bear interest after maturity. Yet the holder was entitled to legal interest from the date of the failure of the bank and refusal to meet a demand of payment when payment was due. *First Nat. Bank v. State Bank*, 107 N. W. (N. Dak.) 61.

52 *Ibid*; *Bank v. Harrison*, 66 Pac. (Arizona) 460.

53 *Bank v. Harrison*, 66 Pac. 460.

54 *Ibid*. A certificate of deposit payable on demand after a stated period contained a stipulation that it should not bear interest after maturity. Yet the holder was entitled to legal interest from the date of the failure of the bank and refusal to meet a demand of payment when payment was due. *First Nat. Bank v. State Bank*, 107 N. W. (N. Dak.) 61.

can be begun without demand, and the statute of limitations runs concurrently.⁵⁵ In these jurisdictions they are overdue as soon as given and consequently are subject to all equities like other overdue paper.⁵⁶

(b.) The second construction put on demand certificates is they are properly payable only on their return and presentation; and an innocent purchaser for value and without notice of equities, within a reasonably short time, is entitled to the rights of a bona fide holder.⁵⁷

(c.) By the third construction a demand certificate is not due, nor can an action be begun thereon until payment has been demanded on the return of the certificate. Until that event the statute of limitations is inoperative, and the law protects it as perfectly as any other negotiable paper, except in the states where such certificates are regarded as mere receipts. This is the better rule and has a more general application than any other.⁵⁸

(d.) When a certificate is made payable at a fixed date, of course it is not due until that time, and is protected like any other negotiable paper until its maturity.⁵⁹ If it is not then paid, an action may be brought, after a demand and refusal to

55 *Mitchell v. Easton*, 37 Minn. 335; *Lynch v. Goldsmith*, 64 Ga. 42; *Meador v. Dollar Sav. Bank*, 56 Ga. 605; *Hunt v. Divine*, 37 Ill. 137; *Brummagin v. Tallant*, 29 Cal. 503; *Curran v. Witter*, 68 Wis. 16; *Tripp v. Curtenius*, 36 Mich. 494. But see *Birch v. Fisher*, 51 Mich. 36, 39.

56 *Meador v. Dollar Sav. Bank*, 56 Ga. 605.

57 *Birch v. Fisher*, 51 Mich. 36, 40. See *Gregg v. Union Co. Nat. Bank*, 87 Ind. 238.

58 *Elliott v. Capital City State Bank*, 103 N. W. (Iowa) 778, overruling *Mereness v. First Nat. Bank*, 112 Iowa 11; *McGough v. Jamison*, 107 Pa. 336; *Finkbone's Appeal*, 86 Pa. 368; *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377; *Howell v. Adams*, 68 N. Y. 314; *Smiley v. Fry*, 100 N. Y. 262; see *Birch v. Fisher*, 51 Mich. 36, 40; *Fells Point Sav. Institution v. Weedon*, 18 Md. 320; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580; *National Bank v. Washington Co. Nat. Bank*, 5 Hun (N. Y.) 605; *Sharp v. Citizens' Bank*, 98 N. W. (Neb.) 50; *Citizens' Bank v. Fromholz*, 64 Neb. 284; *Tobin v. McKinney*, 14 S. Dak. 52. See note in 15 L. R. A. 386.

59 See *Kirkwood v. First Nat. Bank*, 40 Neb. 484. This principle of course does not apply in states which hold that it is non-negotiable paper.

pay.⁶⁰ In some states a demand is not necessary.⁶¹ It may not be needful to add that when the statute has begun to run, its action does not cease with the death of the depositor.⁶²

11. Effect of Renewal.

The renewal of a certificate that has matured does not create a new debt, but simply extends the time for paying the old debt. Consequently the statute begins to run when the debt matures.⁶³ This principle was successfully applied to defeat an action by the holder of a certificate against the directors of a bank, who, by virtue of a statute, were liable for the payment of any debt "then existing or incurred while they remain in office." As the action was not begun until after the statutory period which began to run from the maturity of the certificate, they escaped.

The surrender by a public officer of a certificate for money in a bank to his successor, who is credited with the amount, does not affect the liability of the bank for the amount deposited.⁶⁴

12. Defences.

As a certificate, properly executed, is an acknowledgment that the bank has the money specified therein and credited to the depositor, the burden of proof when payment is disputed is on the bank to show that it has discharged its liability.⁶⁵

What defences are open to a bank that is sued for the re-

⁶⁰ *Brown v. McElroy*, 52 Ind. 404.

⁶¹ *Hodgson v. Cheever*, 8 Mo. App. 318; *Hunt v. Divine*, 37 Ill. 137. For the construction of certificates that bear interest "if left" for a stipulated period see *Kirkwood v. First Nat. Bank*, 40 Neb. 484; *Cate v. Patterson*, 25 Mich. 191.

⁶² *Mereness v. First Nat. Bank*, 112 Iowa 11. See ante note 57.

⁶³ *Patterson v. Wade*, 115 Fed. 770; *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Lee v. Hollister*, 5 Fed. 752. The surrender of a certificate on which an action has been begun and an acceptance of a new one abates the action. *Manuel v. Mississippi R.*, 2 Pa. 198.

⁶⁴ *McDonald v. State*, 41 C. C. A. 278.

⁶⁵ *Cushman v. Illinois Starch Co.*, 79 Ill. 281; *Honig v. Pacific Bank*, 73 Cal. 464.

covery of a certificate?⁶⁶ If it is non-negotiable, the original holder can plead the statute of limitations, as previously explained,⁶⁷ payment,⁶⁸ or set-off.⁶⁹

A negotiable certificate is protected until maturity, like other negotiable paper.⁷⁰ Thus a bank cannot successfully interpose lack of consideration against another who has loaned money in good faith thereon.⁷¹ Nor can a surety, who has signed a certificate, make a similar defence against one who has foreborne to withdraw his deposit, though without stipulating the period, and surrendered his certificate for another containing the name of such surety.⁷²

After the certificate is due, the same defences are open against subsequent purchasers as in the case of other negotiable paper.⁷³

13. When is a Certificate a Loan?

Sometimes a certificate of deposit represents a loan by or to a bank; in a case of this nature the lender must be treated like others of his kind. Thus a bank, desiring a loan of another bank, gave for the money a certificate of deposit, was credited with the amount, and at different times drew portions. After the borrower's failure the other bank claimed to be a depositor and entitled to a dividend thereon, for which the stockholders

66 In an action by the endorsee against the bank it may show that the endorsement was made and the certificate was received in furtherance of an illegal contract. *Thomas v. First Nat. Bank*, 116 Ill. App. 20, *affd.* 213 Ill. 261.

67 *Renfro v. Merchants' & Mech. Bank*, 83 Ala. 425.

68 *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71.

69 *Ibid.*

70 *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71; *Kirkwood v. First Nat. Bank*, 40 Neb. 484.

71 *Holland Trust Co. v. Waddell*, 75 Hun (N. Y.) 104. A bank is not the bona fide purchaser in due course of business of a certificate of deposit received conditionally in payment from a sending bank that it should be payment if paid. *Commercial Nat. Bank v. Citizens' State Bank*, 109 N. W. (Iowa) 198.

72 *Ballard v. Burton*, 64 Vt. 387.

73 *Coye v. Palmer*, 16 Cal. 158; *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71; *Gregg v. Union Co. Nat. Bank*, 87 Ind. 238.

were liable by statute. The contention, however, was not sustained.⁷⁴

14. Effect of Certificate Given by Insolvent Bank.

In every state, by common law or statute, as we have seen, banks that are known by their officers to be insolvent are forbidden to receive deposits. This prohibition applies with no less force to certificates of deposit, regardless of the time of repaying the deposit. If the certificate is not to be paid for a year or other period, the money received by the bank is none the less a deposit within the meaning of the statutes enacted on this subject.⁷⁵

15. Assignment of Certificate After Issuing Bank's Failure. Interpleader.

A certificate of deposit assigned after the issuing bank's failure and appointment of a receiver cannot be set off by the assignee against the claim he owes the bank to the prejudice of other creditors.⁷⁶

Sometimes a certificate of deposit is assigned by the holder, and after his death rival claims thereto spring up between the assignee and the holder's executor. In such a case interpleader may be brought by the bank to determine the ownership.⁷⁷ Of course, a bank should not pay a certificate when enjoined not to pay.⁷⁸

74 *State Sav. Bank v. Foster*, 118 Mich. 268.

75 *State v. Shove*, 96 Wis. 1. See Chap. VI. §9.

76 *Ingwersen v. Buckholz*, 88 Ill. App. 73; *Smith v. Mosbey*, 9 Heisk. (Tenn.) 501. A banker who, knowing of a debtor's insolvency, accepts from him notes, nominally for collection, and issues a negotiable certificate of deposit for their face with a secret agreement that it shall not be transferred and then buys it at a discount is a trustee of the funds collected and personally liable therefor to the debtor's creditors. *Sabin v. Anderson*, 31 Or. 487.

77 *Harris Bkg. Co. v. Miller*, 89 S. W. (Mo.) 629.

78 *Springfield Marine & Fire Ins. Co. v. Peck*, 102 Ill. 265.

CHAPTER XV.

ENTRIES AND PASS-BOOKS.

- | | |
|--|---|
| <ol style="list-style-type: none">1. Deposit slip.2. Is acknowledgment of money received.3. Deposit without entry in pass-book.4. Nature of entries in pass-book.5. Pass-book is not negotiable.6. Duty to examine balanced pass-book.7. Nature of examination required.8. Consequences of non-examination. | <ol style="list-style-type: none">9. Presumption following depositor's neglect.10. What is a reasonable period.11. Who should make examination.12. When depositor is not bound by his agent's examination.13. Should he not always be?14. Action to recover deposit.15. Entries as evidence.16. Operation of statute of limitations. |
|--|---|

1. Deposit Slip.

The first step in making a deposit is to enter the items, money, checks and other matters in detail on a slip prepared by the bank for that purpose. These entries are made by the depositor himself or his agent, and not by any officer of the bank, and, being original, are the highest evidence in any subsequent dispute.¹ But a bank that receives a deposit without such a ticket is none the less liable.²

2. Is Acknowledgment of Money Received.

The deposit slip is an acknowledgment that the amount of money named therein has been received;³ a memorandum or

¹ Weisinger v. Bank, 10 Lea (Tenn.) 330; Andrews v. State Bank, 9 N. Dak. 325; Talcott v. First Nat. Bank, 53 Kan. 480.

² Jackson Ins. Co. v. Cross, 9 Heisk. (Tenn.) 283; Winter v. Bank, 2 Caines (N. Y.) 337; Talcott v. First Nat. Bank, 53 Kan. 480; Andrews v. State Bank, 9 N. Dak. 325.

³ First Nat. Bank v. Clark, 134 N. Y. 368, 372. This case contains a full description of its use.

note to help the memory.⁴ It is not proof of liability and will not support an action against the bank.⁵ The slip is not conclusive, and may be explained.⁶

3. Deposit Without Entry in Pass-Book.

A deposit is often made without simultaneously entering the amount on the depositor's pass-book. Even then he may have forgotten to bring it or may not have one. Should a rule require a teller to receive no money without a deposit ticket or pass-book, the bank would be liable for a deposit received and wrongly credited.⁷ Again, when no pass-book is kept, the entries of deposits made by the receiving teller, or other proper officer, are *prima facie* correct.⁸

4. Nature of Entries in Pass-Book.

Formerly entries in a pass-book were regarded in a more technical manner than they are to-day. Once, an entry made by a bank officer at the time of receiving a deposit was deemed original and binding on the bank,⁹ but not on the depositor;¹⁰

4 Weisinger v. Bank, 10 Lea (Tenn.) 330.

5 Hotchkiss v. Mosher, 48 N. Y. 478; First Nat. Bank v. Clark, 134 N. Y. 368.

6 Andrews v. State Bank, 9 N. Dak. 325.

7 Jackson Ins. Co. v. Cross, 9 Heisk. (Tenn.) 283. A depositor is not required "to examine his bank book to discover whether the bank cashier has blundered in counting the money deposited." Kemble v. National Bank, 94 N. Y. App. Div. 544, 548. "In such case the loss to the bank is not innocently suffered, but is the direct result of its own gross neglect, in which case, the depositor can in no case be estopped."

8 Bastrop State Bank v. Levy, 106 La. 586, and cases cited. The entries in a pass book furnish better evidence of the amounts deposited than the entries in a bank's daily balance book. Zang v. Wyant, 25 Colo. 551.

9 Hepburn v. Citizens' Bank, 2 La. Ann. 1007; Mechanics & Traders' Bank v. Banks, 11 La. 260; Manhattan Co. v. Lydig, 4 Johns. (N. Y.) 377. See Wasson v. Lamb, 120 Ind. 514.

10 Mech. & Farmers' Bank v. Smith, 19 Johns. (N. Y.) 115; Asher v. National Park Bank, 7 Alb. L. J. 43. A depositor's pass book "does not prove itself, and the entries it contains furnish no better evidence of the [depositor's] claim than the entries in the books of the bank, when admitted, they are of equal weight." Watson v. Phoenix Bank, 8 Met. (Mass.) 217.

and on neither when the entry was made afterward by copying from the ledger.¹¹ The modern law has swept away all this refining. The rights of neither party are absolutely fixed by the entries, and they are always "open to examination and correction."¹² Prima facie they are correct, but not conclusive.¹³ Consequently, a depositor who proves that an entry is incorrect can recover the amount not credited to him.¹⁴ Nor will a by-law or rule of a bank, declaring that all payments must be examined at the time, prevent a depositor from showing afterward that there was a mistake in his account of deposits and receipts.¹⁵

A bank is not required to notify a depositor of an error in entering a deposit; how its silence must be regarded depends on circumstances.¹⁶ On the other hand, a depositor's silence is an admission of the correctness of entries until action is taken to overcome them.¹⁷

5. Pass-Book is Not Negotiable.

A pass-book is not negotiable, nor by virtue of a written order signed by the depositor.¹⁸

6. Duty to Examine Balanced Pass-Book.

A bank, of course, is liable to a depositor for errors, forgeries and the like before balancing his book. After it has been bal-

11 *Manhattan Co. v. Lydig*, 4 Johns. 377; *Hepburn v. Citizens' Bank*, 2 La. Ann. 1007.

12 *Quattrochi v. Farmers' & Merch. Bank*, 89 Mo. App. 500; *Branch v. Dawson*, 36 Minn. 193; *Talcott v. First Nat. Bank*, 53 Kan. 480, and cases cited.

13 *Ibid*; *Mechanics Bank v. Earp*, 4 Rawle (Pa.) 384; *Boston & Me. R. v. Oliver & Salmon Falls Bank*, 32 N. H. 172; *Commercial Bank v. Rhind*, 3 Mac. H. of L. (Eng.) 643; *First Nat. Bank v. Whitman*, 94 U. S. 343, 346. "A pass book is not always the most reliable evidence." *Simmons Hardware Co. v. Bank*, 41 S. C. 177, 187.

14 *Mechanics & Farmers' Bank v. Smith*, 19 Johns. (N. Y.) 115.

15 *Asher v. National Park Bank*, 7 Alb. L. J. 43.

16 *Poor v. National Union Bank*, 17 N. Y. Week. Dig. 320.

17 *McLaughlin v. First Nat. Bank*, 71 Ill. App. 329.

18 *McCaskill v. Conn. Sav. Bank*, 60 Conn. 300; *Eaves v. People's Sav. Bank*, 27 Conn. 229; *Witte v. Vincenot*, 43 Cal. 325; *Stewart v. State*, 42 Tex. 242.

anced and returned to him with the vouchers, and a reasonable time has passed for examining them, the book becomes an account stated. Unless objection is made thereto within that period, the account is deemed to be *prima facie* correct,¹⁹ and the depositor is precluded from making reclamation against the bank on the discovery of a forgery whenever the delay has resulted in real or probable injury to the bank.²⁰ And "as the

19 *First Nat. Bank v. Allen*, 100 Ala. 476; *Weinstein v. National Bank*, 69 Tex. 38; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219; *Shipman v. Bank*, 126 N. Y. 318; *Harley v. Eleventh Ward Bank*, 76 N. Y. 618; *Schneider v. Irving Bank*, 1 Daly (N. Y.) 500; *Clark v. Mechanics' Nat. Bank*, 11 Daly 239; *Bucklin v. Chapin*, 1 Lans. (N. Y.) 443; *Bruen v. Hone*, 2 Barb. (N. Y.) 586; *Commonwealth v. Reading Sav. Bank*, 136 Mass. 16; *Nordine v. First Nat. Bank*, 41 Or. 386; *Mechanics' Bank v. Earp*, 4 Rawle (Pa.) 384; *McKeen v. Boatmen's Bank*, 74 Mo. App. 281; *Kenneth Investment Co. v. National Bank*, 96 Mo. App. 125; *Benton Co. Bank v. Walker*, 85 Iowa 728; *Schoonover v. Osborne*, 108 Iowa 453; *Anderson v. Leverich*, 70 Iowa 741; *First Nat. Bank v. Whitman*, 94 U. S. 343, 346; *Commercial Bank v. Rhind*, 3 Mac. H. of L. (Eng.) 643. See *Dingley v. McDonald*, 124 Cal. 90. An account stated affords strong presumptive evidence of its truth, but is not conclusive. Accounts between correspondent banks are usually rendered at times fixed by agreements. When an account is thus sent which is acknowledged to be correct, it is an account stated. Nevertheless, errors may be corrected, especially where they are probable. *Louisville Bkg. Co. v. Asher*, 112 Ky. 138. A banker renders an account of a sale of stock to a customer which is received without objection. His acquiescence in ignorance of the facts does not preclude him from afterward disputing the account. *Follansbee v. Parker*, 70 Ill. 11.

20 *Leather Manuf. Bank v. Morgan*, 117 U. S. 96; *First Nat. Bank v. Whitman*, 94 U. S. 343, 346; *Dana v. National Bank*, 132 Mass. 156; *Weinstein v. National Bank*, 69 Tex. 38; *Fifth Nat. Bank v. Iron City Nat. Bank*, 92 Tex. 436, affg. 47 S. W. (Civ. App.) 533; second appeal, 71 S. W. 612; *Hardy v. Chesapeake Bank*, 51 Md. 562; *Myers v. Southwestern Nat. Bank*, 193 Pa. 1; *De Feriet v. Bank*, 23 La. Ann. 310; *First Nat. Bank v. Allen*, 100 Ala. 476; *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72; *Janin v. London & San Francisco Bank*, 92 Cal. 14; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219. In one of the latest cases to recover a deposit drawn by the plaintiff's employe and credited to his account, long after the balancing and return of the depositor's book, it was declared to be the plaintiff's duty to exercise due diligence in examining the account, which he had not done. *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 478. A plaintiff's cashier, who was insolvent, instructed the defendant bank to apply the plaintiff's deposit in payment of his individual note, which was done, and

right to seek and compel restoration and payment from the person committing the forgeries is, in itself, a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be effectively, exercising it."²¹

The preclusion, however, is not absolute. "An account stated or settled is a mere admission that the account is correct. It is not an estoppel. The account is still open to impeachment for mistakes or errors."²² But the depositor must clearly show that he has been misled by fraud, mistake, or manifest error, or has not had an opportunity to examine the account, to be worthy of relief.²³ Even then, he will not prevail if the bank can show that the depositor's delay or neglect to make the needful examination has prevented, or will prevent, the institution from escaping the loss which it could and would have made good except for his delay or neglect.²⁴

Some of the courts have gone further holding that a bank is presumptively injured by the depositor's neglect to examine

at the end of the month a statement was sent showing the payment. One of the plaintiff's directors, who saw the statement, being dissatisfied, questioned the cashier concerning it. Six months passed, the cashier absconded, and the plaintiff then sought to recover the money. It was then too late to question the authority of the cashier's act and the plaintiff therefore failed in its contention. *Iron City Nat. Bank v. Fifth Nat. Bank*, 71 S. W. (Tex. Civ. App., second appeal) 612; first appeal, 47 S. W. 533; appeal to Sup. Ct. 92 Tex. 436.

²³ *Harley v. Eleventh Ward Bank*, 76 N. Y. 618; *Farry v. Farmers' & Mech. Bank*, 58 At. (N. J.) 305; *Mechanics' Nat. Bank v. Harter*, 63 N. J. Law, 578; *First Nat. Bank v. Allen*, 100 Ala. 476, 485; *Janin v. London & San Francisco Bank*, 92 Cal. 14; *Hardy v. Chesapeake Bank*, 51 Md. 562; *McKeen v. Boatmen's Bank*, 74 Mo. App. 281. See *Atlanta Nat. Bank v. Burke*, 81 Ga. 597.

²⁴ Cases in note 20. In *Murphy v. Metropolitan Nat. Bank*, 77 N. E. (Mass.) 693, 695, Knowlton, Ch. J., said: "We have no doubt that, on the return of [the depositor's] pass book with his checks, it was his duty to do what a reasonable person would be expected to do, in the examination of his accounts to see whether it was correct. If there was anything to put him on inquiry as to the identity of the persons to whom payments had been made, it would be his duty to investigate the subject."

his pass-book within a reasonable period.²⁵ More generally, the presumption has not been raised; the courts holding the ill consequences of the depositor's neglect to be a fact, which must be proved like any other.²⁶

7. Nature of Examination Required.

Formerly, in some states, and still in England, a depositor was under no duty at any time to examine his pass-book and vouchers, consequently his right of recovery, whenever a cause of action existed, was not cut off until the end of the statute of limitations.²⁸ Now a positive duty to make an examination within a reasonable or fixed period has been everywhere established.²⁹ Besides reasonable diligence, reasonable care also must be exercised in examining the book and vouchers.³⁰ That this duty does not extend to an examination of the endorsements on the checks returned has been declared on several important occasions.³¹

8. Consequences of Non-Examination.

If the examination is made within the proper period and

25 *Leather Manuf. Bank v. Morgan*, 117 U. S. 96.

26 *Janin v. London & San Francisco Bank*, 92 Cal. 14.

27 Unreported case. *Chatterton v. London County Bank*, Law Jour. April 2, 1904, p. 168.

28 "A depositor owes no duty to a bank requiring him to examine his pass book or returned checks with a view to the detection of forgeries. He has a right to assume that the bank before paying his checks will ascertain the genuineness of the endorsements." *Wachsmann v. Columbia Bank*, 26 N. Y. Supp. 885, 887, *affd.* 8 N. Y. Misc. 280; *Weisser v. Denison*, 10 N. Y. 689; *Welsh v. German-American Bank*, 73 N. Y. 424; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209; *First Nat. Bank v. Continental Nat. Bank*, 17 N. Y. Week. Dig. 42. In *Shipman v. Bank*, 126 N. Y. 318, the rule was slightly changed; in *Schneider v. Irving Bank*, 1 Daly (N. Y.) 500, a somewhat different view was taken; in *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, the rule was further modified as stated in the next section. *Manuf. Nat. Bank v. Barnes*, 65 Ill. 69. The New York rule prevails in *Tenn. Pollard v. Wellford*, 99 Tenn. 113, 118.

29 *Kenneth Investment Co. v. National Bank*, 96 Mo. App. 125 and cases cited.

30 *Mechanics' Nat. Bank v. Harter*, 63 N. J. Law 578.

31 *Shipman v. Bank*, 126 N. Y. 319; *United Security Co. v. Central Bank*, 185 Pa. 586.

forged payments are discovered, then the depositor's rights of reclamation are clearly fixed.³² But if he neglects to make an examination within a reasonable period, the courts differ concerning the consequences of his neglect. By one rule he is precluded from recovery,³³ if the bank will thereby be injured; by the other rule he is precluded from making reclamation after the balancing of his pass-book for frauds thereafter perpetrated, against which he would have probably guarded himself had he made an examination, but is not cut off from recovering for similar frauds perpetrated before.³⁴

9. Presumption Following Depositor's Neglect.

Whether prejudice or loss to the bank may be presumed, or whether this must be proved to stop the depositor from recovering, is a question not so well settled as it might be. The highest federal court sustains this presumption;³⁵ other courts insist that an estoppel founded on negligence should not work injury to the depositor unless the bank proves a special damage thereby.³⁶ This is a weighty reason and ought to be decisive.

10. What is a Reasonable Period.

What is a reasonable period is usually a question of fact, though a regulation requiring a depositor to make such an examination within ten days after the return of his book and vouchers is reasonable.³⁷ A delay of seventeen days to make the examination has a legal sanction.³⁸ In New York the legislature has declared that "no bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such

32 See cases in §6, note 20.

33 *First Nat. Bank v. Allen*, 100 Ala. 476, 486.

34 *Critten v. Chemical Nat. Bank*, 171 N. Y. 219; *Kenneth Investment Co. v. National Bank*, 96 Mo. App. 125.

35 *Leather Manuf. Bank v. Morgan*, 117 U. S. 96.

36 *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72; *Kenneth Invest. Co. v. National Bank*, 96 Mo. App. 125; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219.

37 *McKeen v. Boatmen's Bank*, 74 Mo. 281, 288.

38 *Cincinnati Nat. Bank v. Creasy*, 18 Week. Law Bull. (Ohio) 410.

payment, such depositor shall notify the bank that the check so paid was forged or raised";³⁹ in South Dakota the period is narrowed to three months.⁴⁰

11. Who Should Make Examination.

This examination ought to be made by the depositor himself,⁴¹ but not unfrequently it is confided to a clerk. The action of the clerk or secretary binds the depositor by virtue of the application of that great principle that all knowledge of every agent is imputed to his principal.⁴²

12. When Depositor is Not Bound by His Agent's Examination.

To the operation of this rule there is one marked qualification. If the examiner is perpetrating a fraud on the depositor, if he is forging or raising checks, of course he will not intentionally, save in a fit of repentance, declare his iniquity. In these cases, therefore, the depositor in some states is not bound by his clerk's examination, and should he discover a forgery long afterward may obtain redress.⁴³

13. Should He Not Always Be?

Massachusetts,⁴⁴ Alabama,⁴⁵ and perhaps New York ⁴⁶ and

39 Laws, 1904, Ch. 287; Neg. Inst. Law, §326.

40 Laws, 1905. In Cal. the period is one year. Laws, 1905, Ch. 258. In Wis. the same period, Laws, 1905, Ch. 262.

41 *Critten v. Chemical Nat. Bank*, 171 N. Y. 219; *Leather Manuf. Bank v. Morgan*, 117 U. S. 96. Formerly, in New York, an examination by a clerk was sufficient. *Clark v. National Shoe & Leather Bank*, 32 N. Y. App. Div. 316, *affd.* 164 N. Y. 498.

42 *Myers v. Southwestern Nat. Bank*, 193 Pa. 1; *United Security Co. v. Central Nat. Bank*, 185 Pa. 586; *Leather Manuf. Bank v. Morgan*, 117 U. S. 96; *Dana v. National Bank*, 132 Mass. 156.

43 *Hickman v. Green*, 123 Mo. 165; *Merchants' Nat. Bank v. Lovitt*, 114 Mo. 519; *Kenneth Invest. Co. v. National Bank*, 96 Mo. App. 125; *Hardy v. Chesapeake Bank*, 51 Md. 562.

44 *Dana v. National Bank*, 132 Mass. 156, 160.

45 *First Nat. Bank v. Allen*, 100 Ala. 476.

46 *Critten v. Chemical Nat. Bank*, 171 N. Y. 219. But see *Henry v. Allen*, 151 N. Y. 1; *Bienestok v. Ammidown*, 155 N. Y. 47; *Weisser v. Denison*, 10 N. Y. 68; *Welsh v. German-American Bank*, 73 N. Y. 424.

Pennsylvania ⁴⁷ have declined to incorporate this exception into their jurisprudence. In the Dana case ⁴⁸ the examination was made by the depositor's agent and "his knowledge" was declared to be the plaintiff's knowledge and he was bound by it. Said the court: "If such examinations would have given [the plaintiff] notice if made by an honest agent, he cannot affect ignorance because they were made by a dishonest agent who had fraudulent knowledge of the fact." Likewise in the Allen case, one of the best adjudications on the subject, the Supreme Court of Alabama well said: ⁴⁹ "Certainly the bank should not suffer because of the fact that plaintiff's dishonest clerk prevented the plaintiff from doing his duty to the bank."

To this strong and persuasive reasoning is there not a better reason for not recognizing the exception, that some things a principal should do himself, and among these, the examination of the record of his transactions with his bank. The law adopts this rule in employing men; and, while admitting that a principal may act through an agent in employing them, still holds him responsible for their competency and other needful qualities as fully as if they were employed by the principal himself. By no law or contract can he impose this responsibility on the agent and escape himself. Ought not the duty of a depositor to examine his pass-book, or be responsible for all the consequences of its examination by another, be regarded as equally imperative?

14. Action to Recover Deposit.

In an action to recover money deposited, but not received because of a mistake in settlement, the depositor is not required to tender a check for the amount as a condition precedent to his recovery. ⁵⁰ To interest also he is entitled on the amount

⁴⁷ *Myers v. Southwestern Nat. Bank*, 193 Pa. 1.

⁴⁸ 132 Mass. 156.

⁴⁹ 100 Ala. 476, 484; *Richmond Electric Co. v. First Nat. Bank*, 56 S. E. (Va.) 152.

⁵⁰ *Cole v. Charles City Nat. Bank*, 114 Iowa 632.

wrongfully charged to his account from the time of making the demand.⁵¹

15. Entries as Evidence.

In such an action the entries in pass-books made by the bank's officers in the regular course of business may be admitted in behalf of the adverse party.⁵² And if the books are offered in evidence by one party the other may avail himself of any part of the evidence therein, for example, the condition of a particular account.⁵³ Again, a party who has introduced in evidence the books of a bank cannot impeach them entirely, but may show that particular items are wrong, and that by mistake or fraud they have been kept improperly.⁵⁴

Other entries are made, especially those relating to renewal notes, that often possess importance. Not infrequently new notes are taken and not paid, and then the bank falls back on the sureties to the originals. They, in turn, claim immunity by the action of the bank in accepting new notes without their knowledge and consent. In these cases its books may be introduced against the institution to show that the entries made at the time of the maturity of the originals were of the kind ordinarily made to indicate payment.⁵⁵ Nevertheless, the entries are not conclusive precluding explanation.⁵⁶

51 *Etting v. Commercial Bank*, 7 Rob. (La.) 459.

52 *Globe Sav. Bank v. National Bank*, 64 Neb. 413; *German Nat. Bank v. Leonard*, 40 Neb. 676; *Atlanta Trust & Bkg. Co. v. Close*, 115 Ga. 939. A pass book in the cashier's handwriting is admissible in an action by the depositor's administrator against the bank to recover the deposit. *Nicholson v. Randall Bkg. Co.*, 130 Cal. 533. An entry by an officer is presumed to have been made in an action by a depositor against a bank, but such a presumption does not exist in an action by the bank against the directors. *Savings Bank v. Caperton*, 87 Ky. 306. A synoptical exhibit of the contents of bank books is not the best evidence. The books must be produced, or satisfactory reason shown why they cannot be. *Ritchie v. Kinney*, 46 Mo. 298.

53 *Blanchard v. Commercial Bank*, 21 C. C. A. 319.

54 *Merchants' Bank v. Rawls*, 7 Ga. 191.

55 *German Nat. Bank v. Leonard*, 40 Neb. 676; *Globe Sav. Bank v. National Bank*, 64 Neb. 413; *Citizens' Nat. Bank v. Wilson*, 121 Iowa 156; *Auburn City Nat. Bank v. Hunsiker*, 72 N. Y. 252; *German Sav. Bank v.*

The rule thus applied for the benefit of sureties possesses a far wider application. It may be thus stated: Book entries made by the proper officer in the regular course of his duties are admissible in behalf of the adverse party when they are of the nature of admissions.⁵⁷

As the entry on the books of a bank may be used as proof of a loan, so may an entry of its payment be admitted to show that it has been paid. Nevertheless, such an entry is open to explanation. Thus, if the entry of payment is made, a bank is not prevented from showing that its payment was conditional and not absolute. The effect of such evidence must be properly weighed and may not be sufficient to overturn the greater force that should be given to the entry itself.⁵⁸

Again, after the death or insanity of the clerk who made the entries, his record book is admissible on proving his handwriting.⁵⁹ Furthermore, "the books of a bank are open to depositors," and "the bank is bound to produce them on all proper occasions. The officers of the bank having charge of the books are to be so far considered as the agents for both parties."⁶⁰

To these principles another may be added of growing importance. While the books of a bank are *prima facie* evidence that its officers possess the knowledge disclosed by them, this is not without a proper limitation. When the entries are made in such a way as to conceal their real character and to mislead an experienced banker, the law will not presume that the bank or the bank's officers do know or understand them.⁶¹ "Possession

Bates Imp. Co., 11 Iowa 196; Oxford State Bank v. Holscher, 115 Iowa 196; Atlanta Trust & Bkg. Co. v. Close, 115 Ga. 939. The entry from a bank journal may be admitted as evidence to show the amount paid on a note payable at a bank. Roe v. Bank of Versailles, 167 Mo. 406.

56 Auburn City Nat. Bank v. Hunsiker, 72 N. Y. 252; Oxford State Bank v. Holscher, 115 Iowa 196; Citizens' Nat. Bank v. Wilson, 121 Iowa 156.

57 Cases in note 1.

58 Citizens' Nat. Bank v. Wilson, 121 Iowa 156.

59 Union Bank v. Knapp, 3 Pick. (Mass.) 96; Watson v. Pacific Bank, 8 Met. (Mass.) 217, 221.

60 Ibid.

61 Central Bank v. Thayer, 184 Mo. 61.

of facts, in books purposely kept in a manner to conceal the truth, is not, in law or morals, knowledge of the facts." This was said concerning the president of a bank who alone had knowledge of the truth, and, though he was president, his knowledge of his own frauds, perpetrated for his individual purposes, was not attributable to the bank.⁶²

16. Operation of Statute of Limitations.

Again, in such cases as the cause of action does not accrue until the discovery of the mistake or fraud, provided the depositor has exercised due diligence in keeping his account, the statute of limitations does not begin to run against him until his discovery.⁶³

⁶² Lamson v. Beard, 36 C. C. A. 56.

⁶³ Cole v. Charles City Nat. Bank, 114 Iowa 632; Cook v. Chicago & R. I. Railway, 81 Iowa 551; Humphreys v. Mattoon, 43 Iowa 556.

CHAPTER XVI.

OWNERSHIP OF DEPOSITS.

1. Contract between bank and depositor.
2. Change of relationship between them.
3. Presumption concerning ownership.
 - a. When bank may decline to pay.
 - b. What bank must do after notice to pay.
 - c. Presumption of ownership may be overturned.
4. Validity of deposit in another's name without his knowledge.
5. Ownership of checks drawn on depository.
 - a. As between depositor and solvent depository.
 1. What crediting works a transfer.
 2. Exception.
 3. When depositor knows deposit is insufficient for payment.
 - b. As between depositor and insolvent depository.
 1. When drawer is solvent.
 2. When drawer is insolvent.
6. Ownership of checks not drawn on depository.
7. Kind of trust deposits.
8. Importance of distinguishing between them.
9. Trust deposits of second kind classified.
 - a. Deposit wrongfully confided to a bank.
 - b. Deposits wrongfully taken or used by a bank.
 - c. Deposits wrongfully applied by bank and depositor.
10. Trust fund to be recovered must exist.
11. When created is presumed to exist.
12. Effect of mingling with mingler's personal fund.
13. Is not lost through owner's ignorance.
14. Nor by diversion.
15. Recovery from replenished fund.
16. Bank's diversion of fund to pay depositor's debt.
17. Its use to pay other debts.
18. When it may be used by bank to pay depositor's debt.
19. Trust money thus known by solvent bank can always be recovered.
20. Duty of bank to watch depositor who has diverted trust fund.
21. Recovery of interest.
22. Mode of procedure by owners.

1. Contract Between Bank and Depositor.

The contract between bank and depositor is to receive his de-

posits and honor his checks on presentation.¹ Various stipulations are adopted concerning the duties and liabilities of both parties, which are usually expressed in the depositor's bank-book given to him at the time of establishing his connection with the bank. These stipulations are binding unless they are unreasonable, or contravene positive law.² A bond or guaranty to secure deposits is not within the prohibition; and is not infrequently given to secure the deposit of a municipality.³ But a secret arrangement between a bank and depositor cannot affect the rights of third persons, nor limit the liability of the bank to them.⁴ The relation of banker and depositor cannot be created without the consent of the owner of the funds deposited.⁵

2. Change of Relationship Between Them.

One of the peculiarities of the relationship between banks and their depositors is, sometimes they are related as debtor and creditor, at other times as principal and agent. The bank is a debtor for nearly all money deposited which can be drawn on demand, or at the expiration of a short period; and often, but not always, for all checks and other instruments deposited for collection. In many cases it is an agent for collecting them, and when thus acting the depositor is the owner until the money is paid and actually received by the bank, and credited to the depositor.

Again, the relationship between bank and depositor may change from that of principal and agent to debtor and creditor, and vice versa; changes that often happen, especially in

1 Chap XIII. §1.

2 See Chaps. III. §§4, 5, and XXI. §8. An account that deposits are "subject to check" means subject to payment within banking hours and on banking days. *Dottenheim v. Union Sav. Bank*, 114 Ga. 788.

3 *Wylie v. Commercial & Farmers' Bank*, 63 S. C. 406; *Hunt v. Hopley*, 120 Iowa 695; *State v. First Nat. Bank*, 88 Fed. 947; *Buhrer v. Baldwin*, 137 Mich. 263. See Chap. VII. §25.

4 *Bank of Commerce v. Franklin*, 90 Ill. App. 91; *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531.

5 *Winslow v. Harriman Iron Co.*, 42 S. W. (Tenn. Ch. App.) 698.

collecting checks.⁶ The change cannot be effected by the bank alone, without the knowledge and consent of the depositor;⁷ or by a usage equivalent to an agreement. The occasions on which this is done will be considered in another chapter.

Lastly, a bank where one has several accounts cannot divert his deposits from one to the other. But if he suffers no damage thereby there can be no recovery.⁸

3. Presumption Concerning Ownership.

As the law presumes that between bank and depositor a deposit belongs to the person in whose name it is entered,⁹ the depository cannot question his ownership¹⁰ and transfer the money to another account.¹¹

6 *Marine Bank v. Fulton Bank*, 2 Wall. (U. S.) 252.

7 *Winslow v. Harriman Iron Co.*, 42 S. W. (Tenn. Ch. App.) 698; *Foster v. Rincker*, 4 Wy. 484. See *First Nat. Bank v. Bank of Monroe*, 33 Fed. 408.

8 *Rennyson v. People's Nat. Bank*, 4 Pa. Super. Ct. 640. See Chap. XII. §20.

9 *Egbert v. Payne*, 99 Pa. 239; *First Nat. Bank v. Mason*, 95 Pa. 113; *Penn Bank v. Frankish*, 91 Pa. 339; *Detroit Sav. Bank v. Haines*, 128 Mich. 38. See Chap. VI. §1.

10 *Tassel v. Cooper*, 9 C. B. (Eng.) 509; *Graham v. Williams*, 21 La. Ann. 594; *Lund v. Seamen's Bank*, 37 Barb. (N. Y.) 129; *First Nat. Bank v. Randall*, 1 Tex. Ct. of App. (Civ. Cases) §971. See *Commercial Bank v. Jones*, 18 Tex. 811. In a recent case the court said: "Where, a bank receives money from a person, and gives him credit therefor, it is in duty bound to honor his checks to the amount of such deposit, and it cannot refuse to honor his checks or drafts against the fund on the ground that the money deposited belonged to some other person, or that the title of the depositor to it is defective. These are matters in which the bank is not interested or concerned until the third party who claims to own the fund shall proceed to enforce his rights." *Nehawka Bank v. Ingersoll*, 2 Neb. (Unof.) 617, 623; *McLaughlin v. First Nat. Bank*, 6 Dak. 406; *National Bank v. Insurance Co.*, 104 U. S. 54, 59; *Duckett v. National Mech. Bank*, 86 Md. 400. A bank that has received and credited money to a depositor cannot maintain that it belongs to another and appropriate it to his account. *Citizens' Nat. Bank v. Alexander*, 120 Pa. 476.

11 *Citizens' Nat. Bank v. Alexander*, 120 Pa. 476; *First Nat. Bank v. Mason*, 95 Pa. 113. A deposited a draft in a bank, leaving his pass book to be balanced, which was returned to him after the failure of the bank. It there appeared that the cashier had stricken out the credit item of the draft and transferred it to a company to which A had previously given

(a.) But, if knowing otherwise, the bank may refuse to pay his check, and may deliver the deposit to the true owner.¹² As it belongs *prima facie* to the depositor, the burden of proof is on the claimant to prove his title.¹³

(b.) The contract to re-deliver a deposit on the depositor's order does not justify a bank, after notice has been given by another of his ownership, in disregarding it.¹⁴ Payment is then made at its peril.¹⁵ Says Justice Barker: "That one upon receiving a deposit has contracted to re-deliver it to the depositor does not justify such a re-delivery after notice that the deposit is the property of a third person, and the true owner may, by taking proper measures, compel its delivery or payment to himself."¹⁶ The real owner has an unquestioned right to resort to replevin, or other proper action, to recover his property; and the depository should take no wrongful action to prevent him from obtaining his rights.¹⁷

In applying this rule, a bank that receives notice from a claimant is not required to retain the deposit beyond a reasonable time for him to prove his right thereto. Neglecting to do this, the bank is justified in paying the deposit to the person credited with the money.¹⁸ Furthermore, a bank that pays,

his note. Though there had once been an understanding that the money received on the draft should be thus applied, it did not justify the cashier in transferring the credit item after the note had passed beyond control of the company. *Kunze v. Tawas State Sav. Bank*, 130 Mich. 688. See Chap. VI. §1.

¹² *Hanna v. Drovers' Nat. Bank*, 194 Ill. 252. Thus if a deposit is put into a bank by an agent in his own name and the bank knows its true ownership, it must not suffer the agent, without proper authority, to withdraw the deposit. *O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 333; *Jamison v. Lockwood*, 26 N. Y. Misc. 730.

¹³ *Egbert v. Payne*, 99 Pa. 239; *Detroit Sav. Bank v. Haines*, 128 Mich. 38; *Bessemer Sav. Bank v. Anderson*, 134 Ala. 343.

¹⁴ *Pearce v. Dill*, 149 Ind. 136.

¹⁵ *Ibid.*

¹⁶ *McCarthy v. Provident Institution*, 159 Mass. 527, 530; *McCloskey v. Provident Institution*, 103 Mass. 300; *Parkman v. Suffolk Sav. Bank*, 151 Mass. 218, and cases cited.

¹⁷ *Ibid.*

¹⁸ *Drumm-Flato Commission Co. v. Gerlack Bank*, 92 Mo. App. 326.

through lack of knowledge, a fund claimed by two parties, to the wrong party, is not estopped from claiming it after ascertaining the truth.¹⁹

(c.) The presumption, that a deposit belongs to the one in whose name it is entered, may be overturned by proper evidence, and the occasions are not infrequent wherein this is done. Thus it may be shown that a deposit standing in the name of a partner belongs to a partnership.²⁰

4. Validity of Deposit in Another's Name Without His Knowledge.

Notwithstanding the presumption previously mentioned, as between the one actually making a deposit and another person in whose name a deposit may stand, to whom does it belong? Simple as the question may seem to be, the answer is not free from complexity. If the deposit is made with the understanding that the same person can draw the money out, unquestionably he can exercise the right.²¹ This is a clear rule, though

A bank collected a note for B. C notified the bank that the proceeds belonged to him and indemnified the institution against loss for refusing to pay B. Nevertheless the bank paid B. C recovered the amount from the bank with interest. *First Nat. Bank v. Bache*, 71 Pa. 213.

19 *Syracuse Sav. Bank v. Hess*, 23 N. Y. Week. Dig. 280. When a check is credited to a depositor and the evidence of ownership is conflicting, it belongs to the bank, that is a debtor to the depositor for the amount. *Moore v. Riverside Bank*, 25 N. Y. Misc. 720.

20 *Gansevoort Bank v. Carragan*, 69 N. J. Law 404. A deposit by a wife from the sale of land belongs to her notwithstanding the unauthorized issue by the bank of a certificate of deposit to her husband, and if paid to him she can recover from the bank. *Burnell v. San Francisco Sav. Union*, 136 Cal. 499. "The true ownership of a fund deposited in bank may be proved to be in another than the person in whom the deposit is made. Whether the bank is chargeable to the true owner must depend upon the circumstances of the case. But as a general rule, where the depositor could recover in an action at law if he were the true owner, the latter can recover in his own name in an action for money had and received." *Rice*, Pres. J., *Frank v. Kurtz*, 4 Pa. Super. Ct. 233, 240, citing *Frazier v. Erie Bank*, 8 W. & S. (Pa.) 18; *Stair v. York Nat. Bank*, 55 Pa. 364; *First Nat. Bank v. Bache*, 71 Pa. 213; *Farmers' & Mech. Nat. Bank v. King*, 57 Pa. 202.

21 *Davis v. Lenawee Co. Sav. Bank*, 53 Mich. 163; *First Nat. Bank v. Taylor*, 37 So. (Ala.) 695; *Greene v. Bank*, 7 Idaho, 577. See Chap. XXII §§20, 21. "As between banker and depositor, there can be no doubt that the bank will be protected in paying out money in such way and on such

something perhaps may be said against one's right to thus use another's name without his knowledge and consent.

If no agreement is made with the bank and the deposit is for a legal purpose,²² and also for the unquestioned benefit of the person in whose name it stands, though without his knowledge, he may rightfully claim it.²³ The donee of a gift in trust surely need know nothing of it,²⁴ nor the donee of stock transferred

terms as the depositor has authorized." *Davis v. Lenawee Co. Sav. Bank*, 53 Mich. 163, 166.

A depositor contracting with a bank for the care of his money can control his funds until he has disposed of them, no matter in what name the account is kept, so long as it is understood to be his account, and has not been put beyond his control by some act that he cannot revoke. *Ibid.* If money is deposited by A in B's name with the agreement that A can draw it out, who does so, B has no claim against the bank therefor. *Greene v. Bank*, 7 Idaho 576. A bank is liable for accepting a deposit and crediting it, contrary to the agreement or understanding, to another, for example, money belonging to a wife to the credit of her husband. *Rhinehart v. People's Bank*, 89 Mo. App. 511.

²² *Leech v. First Nat. Bank*, 99 Mo. App. 681, 684. In New Hampshire any money deposited on a wager may be recovered by statute. *Pub. Stat.* 1901, Chap. 270, §§16, 17; *Wheeler v. Metropolitan Stock Exchange*, 56 At. (N. H.) 754.

²³ *Sparks v. Hurley*, 208 Pa. 166, and cases cited; *Smith v. Bank*, 5 Serg. & R. (Pa.) 318; *Howard v. Windham Co. Sav. Bank*, 40 Vt. 597, 600. See *Cole v. Charles City Nat. Bank*, 87 N. W. (Iowa) 671.

Contra.—*Branch v. Dawson*, 36 Mo. 193, 197. See also *American Ex. Nat. Bank v. Loretta Mining Co.*, 165 Ill. 103. A bank that receives money from A with the request to credit the amount to another and to notify the depositor of the bank's action establishes the debtor and creditor relation between itself and the person thus credited by fulfilling the request. *Heath v. New Bedford Safe Dep. & Trust Co.*, 184 Mass. 481. Having done so it is not justified in returning the deposit to A. *Ibid.* A person by acquiescing in a deposit in a bank in B's name recognizes B's right to draw it out, on which a bank can safely act. *Breeder v. Parchman*, 54 S. W. (Tenn.) 677. A made a general deposit with a banker for the use of another with instructions to such other person to apply the fund for the use and benefit of the depositor. The relation of debtor and creditor was created between the depositor and the bank. *Curtis v. Parker*, 136 Ala. 217.

²⁴ A deposit was entered thus, "Mt. C. Church subject to the order of L trustee," adding the amount. This was a declaration of trust in favor of the church; nor was a notification needful to the church of the deposit.

in good faith and for his benefit, and why should an ordinary donee of a deposit be required to know of the act in order to give it validity? If the object of putting the deposit in the name of another is to serve an ulterior purpose of the actor, to escape taxation or gain some other advantage, whatever quality may thereby attach to his act, the person in whose name the deposit stands acquires no interest therein.²⁵

Wherever such action is considered a bogus performance, a letter written by the bank to the assignee of the person in whose name the deposit is made is no evidence that he has accepted it.²⁶ Nor is a deposit by a debtor to his creditor's account, without his knowledge and consent, payment. In such a case the bank is merely the debtor's agent to pay the money to his creditor.²⁷

Notwithstanding the several applications of this rule, the opposite rule has been more frequently declared and applied,²⁸ especially to deposits in savings institutions.²⁹ These have been sustained as gifts to the persons in whose name, and for whose benefit they were made, although the donees knew not, perhaps until long afterward, of their good fortune. It is true if it could be shown that a deposit thus standing in the name of another was entered through mistake, or to perpetrate a fraud, or that the depositor-of-record would be injured, he could neither claim it, nor could it be forced on him.³⁰ Pre-

Littig v. Mt. Calvary Church, 61 At. (Md.) 635. "It is the donor's act which originates the trust, and it is the intention with which he does the act that is material. The entry unexplained is a sufficient declaration of trust because it indicates an intention to establish a trust; but this may be rebutted." *Milholland v. Whalen*, 89 Md. 212.

²⁵ *Beaver v. Beaver*, 117 N. Y. 421, 423. See Ch. XXII. §5.

²⁶ *Leech v. First Nat. Bank*, 99 Mo. App. 681.

²⁷ *Hill v. Arnold*, 116 Ga. 45.

²⁸ *Exchange Bank v. Gulick*, 24 Kan. 359. See *Greenleaf v. Mumford*, 50 Barb. (N. Y.) 543.

²⁹ Chap. XXII. §§20, 21.

³⁰ A party to a gambling contract who has put money in another's possession, which he has deposited in a bank, is not entitled to the aid of a court of equity for its recovery. *Baxter v. Deneen*, 98 Md. 181.

sumptively, a deposit thus made is for his benefit, and therefore will be sustained, until the presumption is overthrown.³¹

5. Ownership of Checks Drawn on Depository.

(a.) Passing from the ownership of deposits to checks, the ownership of those drawn on the depository will first be considered.

What is the effect of depositing them on the title and money they represent? As between the depositor and a solvent depository on which his check is drawn, a deposit by and credit to the depositor operates as a transfer of ownership.³² By these two acts he has become the owner of the money thus represented, and the bank has no right to change its action on the discovery of an insufficient deposit to pay the check. The drawer's liability to the holder of the check is discharged, and likewise the debt, and the bank has become the debtor.³³ Should

31 *Sparks v. Hurley*, 208 Pa. 166. Chap. XXII. §20.

32 *Peters Shoe Co. v. Murray*, 31 Tex. Civ. App. 259; *Corporation Commission v. Bank*, 137 N. C. 697; *City Nat. Bank v. Burns*, 68 Ala. 267; *Sayles v. Cox*, 95 Tenn. 579; *Howard v. Walker*, 92 Tenn. 452; *Bryan v. First Nat. Bank*, 205 Pa. 7; *First Nat. Bank v. Mason*, 95 Pa. 113; *American Ex. Nat. Bank v. Gregg*, 138 Ill. 596; *Billingley v. Pollock*, 69 Miss. 759, 761; *First Nat. Bank v. Devenish*, 15 Colo. 229; *Oddie v. National City Bank*, 45 N. Y. 735; *Kirkham v. Bank of America*, 165 N. Y. 132; *Market v. Hartshorne*, 3 Keyes (N. Y.) 137; *Pratt v. Foote*, 9 N. Y. 463; *People v. Merchants' & Mech. Bank*, 78 N. Y. 269; *Whiting v. City Bank*, 77 N. Y. 363; *People v. St. Nicholas Bank*, 77 Hun (N. Y.) 159; *People v. Sheppard*, 37 N. Y. App. Div. 119; *Titus v. Mechanics' Nat. Bank*, 35 N. J. Law 588, 592; *Hoffman v. First Nat. Bank*, 46 N. J. Law 604; *Terhune v. Bank*, 34 N. J. Eq. 367; *Bank v. Farmers & Mechanics' Bank*, 10 Vt. 141; *National Bank v. Burkhardt*, 100 U. S. 686; *Levy v. U. S. Bank*, 1 Binn. (U. S.) 27; *Chambers v. Miller*, 13 C. B. (N. S.) 125; *Bolton v. Richard*, 6 Term (Eng.) 139; *Boyd v. Emmerson*, 2 Ad. & E. (Eng.) 184; *Kilsby v. Williams*, 5 Barn. & Ald. (Eng.) 815. See Chap. XVIII. §16.

33 A depositor gave a check on his bank having a sufficient deposit to pay it. The payee deposited the check in another bank for collection, which forwarded the check to the drawee for payment. It was charged on the book to the drawer. The drawee after that held the money as agent for the payee and the drawer was discharged from his check and original debt. *Smith Roofing Co. v. Mitchell*, 117 Ga. 772; *Bailie v. Augusta Sav. Bank*, 95 Ga. 277. See also *Comer v. Dufour*, 95 Ga. 376.

such a bank fail afterward, though not apprehending this at the time of making the record, the depositor to whom credit is given has no preference over other creditors.³⁴

Suppose the payee was a non-depositor and presented a check for payment, which was paid, would the bank have any right to demand repayment after discovering the inadequacy of the drawer's deposit? Again, suppose the maker was a man of repute and the overdrawing was clearly a mere accident, would the bank hesitate to let the transaction stand? Furthermore, there is no reason for regarding such a payment as a mistake, because the bank has complete evidence of the drawer's condition in its own possession, and need make no payment against its will with closed eyes.³⁵

(a, 1.) What crediting works a transfer? Sometimes the evidence is very narrow. The entry in the depositor's book ordinarily accomplishes this result, even though no entry is made in the book of the bank.³⁶ Is not the proper test the putting of the deposit within the creditor's control? And certainly this would be done by crediting him with the amount, or taking

34 *Peters Shoe Co. v. Murray*, 31 Tex. Civ. App. 259.

35 Says the court in *First Nat. Bank v. Devenish*, 15 Colo. 229, 232, "Banks are required, and for their own safety are compelled, to know at all times the balance to the credit of each individual customer, and they accept and pay checks at their own risk and peril. If, from any negligence or inattention to their own affairs, banks improvidently pay when the account of the customer is not in a condition to warrant it, and if by a mistake a check is paid when the drawer has no fund, the bank must look to the customer for rectification, not to the party to whom the check was paid."

36 Cases ante, note 32. "When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, but if it accepts such a check and pays it, either by delivering the currency or giving the party credit for it, the transaction is closed between the bank and the party, provided the paper is genuine." *Oddie v. National City Bank*, 45 N. Y. 735. Consequently, if a draft is given by a bank to its customer, receiving his check in payment, supposing that his deposit is ample for that purpose, it cannot decline to pay the draft on discovering that the depositor's account was different from what the bank supposed. *First Nat. Bank v. Devenish*, 15 Colo. 229.

such action as would confer on him the right to draw for the amount.

(a, 2.) This rule prevails very generally except in California. By the usage existing among the San Francisco banks, a credit given to a depositor on his bank-book may be cancelled by the early discovery of the drawee bank of an insufficient deposit to pay the sum thus credited.³⁷

(a, 3.) Again, a depositor who knows that the drawer's account is insufficient to pay his check commits a fraud as truly in presenting it for credit as in presenting it for payment, and the bank's action would not preclude recovery.³⁸

(b.) The effect of such crediting by an insolvent bank is different.

(b, 1.) The drawer, even though he had to his credit an ample deposit to pay his check, is not released.³⁹ When a bank has no money to pay checks, juggling with the books affects nobody; this principle runs through the entire fabric of the banking law.⁴⁰

Perhaps there is a qualification to this principle. A bank may not possibly have in actual cash enough to cover a check or series of checks at the moment they are credited, as the amount of a bank's resources, especially in a very active bank, is constantly changing.⁴¹ But if a bank is in a known insolvent condition at the time of crediting a check the act binds no one.⁴²

(b, 2.) Again, if the amount credited to the depositor is insufficient to pay his check, surely the bank is under no obliga-

37 *National Gold Bank v. McDonald*, 51 Cal. 64; *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564.

38 *Peterson v. Union Nat. Bank*, 52 Pa. 206.

39 *Sherwood v. Milford State Bank*, 94 Mich. 78; *Exchange Bank v. Sutton Bank*, 78 Md. 577; *Turner v. Bank of Fox Lake*, 3 Keyes (N. Y.) 425; *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538; *Kelty v. Second Nat. Bank*, 52 Barb. (N. Y.) 328; *McIntosh v. Tyler*, 47 Hun (N. Y.) 99; *Ryan v. Paine*, 66 Miss. 678; *Kinney v. Paine*, 68 Miss. 258.

Contra.—*Montgomery Co. v. Cochran*, 126 Fed. 456.

40 *Ibid.* See §10, note 60, for more cases.

41 *Montgomery Co. v. Cochran*, 126 Fed. 456.

42 Chap. XX. §41.

tion to pay it for him. He is therefore a debtor to the amount of the overdraft.⁴³

6. Ownership of Checks Not Drawn on Depository.

The ownership of checks not drawn on the depository depends upon different principles, and will be considered when treating of collections.

7. Kinds of Trust Deposits.

Passing from individual to trust deposits, these may be divided into three kinds: First, those made by an agent, executor, receiver, trustee or other official for the use of some individual, office or estate. The trust relation in these deposits is solely between the depositor and his beneficiary. Thus an attorney who collects money for his client and deposits it in his own name—an ordinary practice—creates simply a debtor and creditor relation between himself and the bank. His trust relation to his client does not pass over to the bank and charge it as trustee for the money. By a proper suit in equity, however, the client can prevent the bank from paying the money to the attorney, and recover it for himself.⁴⁴

In the way of further illustration a depositor who has two concurrent accounts with a bank of discount and deposit, trust company or banker,⁴⁵ by adding trustee to his name to one of them thereby imparts to it a trust character. This rests on the weighty reason that the additional word means something, 'and, in the absence of other notice, must be considered his declaration that the fund is a trust fund, as distinguished from his own fund.'⁴⁶

The second kind of trust deposit acquires that peculiar quality by reason of the wrongful action of the depositor or bank, or both, whereby it is entitled to preferential consideration over other deposits. "To have that effect," says the Supreme Court

43 *Kinney v. Paine*, 68 Miss. 258; *Ryan v. Paine*, 66 Miss. 678.

44 *Rhinehart v. New Madrid Mfg. Co.*, 99 Mo. App. 381.

45 See Chap. XXII. §5.

46 *Jeffray v. Towar*, 63 N. J. Eq. 530, 544; *National Bank v. Insurance Co.*, 104 U. S. 54.

of Missouri, "there must have been something in the circumstances of the deposit to constitute it a special, as contra-distinguished from a general deposit. If the deposit belonged to the former class, the beneficiary relation might well arise; if to the latter, in the absence of mala fides, it could not do so, for by a general deposit in good faith the title to the fund deposited passed. The bank became the owner."⁴⁷ These distinctions, though clearly existing between the different parties, have not always been as clearly seen by the court.⁴⁸

The third kind of trust deposit is received in those transactions wherein a bank acts as an agent of the depositor, especially in making collections.⁴⁹

8. Importance of Distinguishing Between Them.

The three kinds should always be distinguished, because, should the depository fail, the owner of a trust deposit of the first kind shares the same fate as the other general creditors⁵⁰ while the owner of a trust deposit of the second and third kind obtains a preference over the other creditors. Hence the attempt, whenever a bank fails, on the part of the creditors to be included in the favored circle of preferred depositors.

9. Trust Deposits of Second Kind Classified.

Trust deposits of the second kind may be divided into three classes: Those in which a trust is impressed thereon by reason

⁴⁷ Paul v. Draper, 158 Mo. 197, 200, affg. 73 Mo. App. 197; *Officer v. Officer*, 120 Iowa 389.

⁴⁸ See *New Farmers' Bank v. Cockrell*, 106 Ky. 578.

⁴⁹ See Chap. XIII. §9d.

⁵⁰ See Chap. XIII. §10; *Officer v. Officer*, 120 Iowa 389, 393; *Ringo v. Field*, 6 Ark. 43; *Shaw v. Bauman*, 34 Ohio St. 25; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 333; *Cavin v. Gleason*, 105 N. Y. 256, 262; *Paul v. Draper*, 158 Mo. 197; *McAfee v. Bland*, 11 Ky. L. Rep. 1. "When deposits are received, unless they are special deposits, they belong to the bank as a part of its general funds, and the relation of debtor and creditor arises between the bank and the depositor. This is equally so whether the deposit is of trust moneys, or funds which are impressed with no trust, provided the act of depositing is no misappropriation of the fund." *Fletcher v. Sharpe*, 108 Ind. 276, 280; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 333.

of the wrongful action of the depositor unknown to the bank. The most common example is the deposit by an agent in his own name of his principal's money.⁵¹ Deposits of the second class are those impressed with a trust by reason of the sole wrongful action of the bank, for example, in receiving a deposit when insolvent. In the third class are included deposits thus impressed because both depositor and bank are in the wrong, for example, in knowingly applying a trust deposit belonging to a principal, to pay the individual debts of the depositor to the bank.⁵²

(a.) Deposits within the first sub-division are impressed with a trust character whenever an agent deposits them in his own name without his principal's knowledge and consent. To do this is to subject them to the risk of appropriation for the agent's debts, and if the principal knew that his agent was thus abusing his authority, doubtless would remove him or withdraw the deposits; surely he would insist on their restoration to his own control. The courts therefore have never hesitated to stamp such a deposit with a peculiar character, and to give to the true owner larger rights for its recovery.

The agent may wrong his principal in two ways: First, by putting the deposit in his own name; secondly, by diverting the money afterward to his own use.⁵³ The wrongful use of it may be beyond the bank's ken; of this something will be said elsewhere.⁵⁴ But so long as the bank is in possession of the

51 An agent should deposit in his principal's name, or in his own as agent for his principal. *Commercial Bank v. Jones*, 18 Tex. 811.

52 Thus a county treasurer, without legal authority, deposited tax receipts with a private bank for collection, who knew he had no right to receive them. The fund was impressed with a trust and recoverable as a preferred claim against the banker's estate. *Page County v. Rose*, 106 N. W. (Iowa) 744. See §16.

53 *Union Stock Yards Nat. Bank v. Haskell*, 2 Neb. (Unof.) 839; *Union Stock Yards Nat. Bank v. Campbell*, 2 Neb. (Unof.) 72. A factor, though insolvent, may continue to make deposits for his principal. *Interstate Nat. Bank v. Claxton*, 97 Tex. 569; but he has no right to pledge, deposit or apply the property of his principal to secure his own debt. *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206, 216; *First Nat. Bank v. Schween*, 127 Ill. 573.

54 See §14.

money, its duty to return it, whether solvent or insolvent, is unquestioned.⁵⁵

Presumably a deposit is thus entered by an agent for a wrongful purpose. On the other hand, if this is done with the principal's knowledge and consent, it would belong to the kind of deposit first described, and be governed by the same principles.⁵⁶

(b.) The second class of trust deposits may be subdivided into those that ought not to have been received, and others, that were rightfully received, but wrongfully used. Deposits received after a bank's insolvency fall within the first subdivision. Taking advantage of a depositor's ignorance of its real condition, it inflicts on him a manifest wrong; he would not have deposited his money there had he known of the bank's real condition.

Deposits falling within the other subdivision are those deposited for a particular purpose, especially the payment of notes, mortgages, checks and other obligations. In these cases the bank is simply the agent of the depositor to execute his will and agreement. Money thus deposited is impressed with a trust and its diversion does not prevent its recovery if it can be ascertained.⁵⁷

(c.) The third class of trust deposits are those wrongfully received or used with the knowledge of both parties. Such an act is always smitten down by the judicial power.⁵⁸ Yet the temptation of a bank to abuse its position and take the money of a principal within its grasp to pay the debt of his agent has

55 *Union Stock Yards Nat. Bank v. Campbell*, 2 Neb. (Unof.) 72.

56 *Henry v. Martin*, 88 Wis. 367. If one deposits trust money in his own name, which is mingled with the beneficiary's consent or knowledge, its identity is lost and its trust character is destroyed by his own act, and after the bank's failure he cannot recover it as a trust fund. *Meldrum v. Henderson*, 7 Colo. App. 256. If a person acts as an agent of another, an express disclosure of his principal's name on the face or in the signature is not essential to protect the agent from liability against one who knows the true situation. *Metcalf v. Williams*, 104 U. S. 93.

57 *McKee v. Lamon*, 159 U. S. 317; *Winfield Nat. Bank v. Railroad Loan & Sav. Assn.*, 81 Pac. (Kan.) 202.

58 *State Bank v. McCabe*, 98 N. W. (Mich.) 20. See §16.

often been too strong to resist. Such action has always been indefensible in law and morals.

10. Trust Fund to be Recovered Must Exist.

To recover the trust fund, it must have an actual, as distinguished from a recorded, or theoretical existence.⁵⁹ The crediting of a fund without adding an actual corresponding amount creates no right in the beneficiary to recover the sum credited, whether the amount was actually in the bank's possession or not.⁶⁰ The presence of the money credited in the bank is not enough; it must be an addition existing at the time

59 See Chap. VI. §9; *Bank of Florence v. U. S. Sav. & Loan Co.*, 104 Ala. 297; *Byrne v. McGrath*, 130 Cal. 316; *Continental Nat. Bank v. Weems*, 69 Tex. 489; *Ellicott v. Kuhl*, 60 N. J. Eq. 333; *Collins v. Steuart*, 58 N. J. Eq. 392; *Board v. Wilkinson*, 119 Mich. 655; *Sherwood v. Central Mich. Sav. Bank*, 103 Mich. 109, 115; *Peak v. Ellicott*, 30 Kan. 156; *Kansas State Bank v. First State Bank*, 62 Kan. 788; *Travellers' Ins. Co. v. Caldwell*, 59 Kan. 156; *Hubbard v. Alano Mfg. Co.*, 53 Kan. 637; *City of Lincoln v. Morrison*, 64 Neb. 822; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756 and 49 Neb. 125; *State v. Bank*, 54 Neb. 725; *Harrison v. Smith*, 83 Mo. 210; *Bircher v. Walther*, 163 Mo. 461; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358; *Shute v. Hinman*, 34 Or. 578; *Wulbern v. Timmons*, 55 S. C. 456; *Plano Mfg. Co. v. Auld*, 14 S. Dak. 512; *Cavin v. Gleason*, 105 N. Y. 256, 262; *People v. City Bank*, 96 N. Y. 32; *Bergstresser v. Lode-wick*, 37 N. Y. App. Div. 629; *Windstanley v. Second Nat. Bank*, 13 Ind. App. 544; *Woodhouse v. Crandall*, 197 Ill. 104, revg. 99 Ill. App. 552; *Kirby v. Wilson*, 98 Ill. 240; see *Bayor v. Am. Trust & Sav. Bank*, 157 Ill. 62; *School Trustees v. Kirwin*, 25 Ill. 73; *Union Nat. Bank v. Goetz*, 138 Ill. 127; *Wetherell v. O'Brien*, 140 Ill. 146; *Twohy Mercantile Co. v. Melbye*, 78 Minn. 357; *Bishop v. Mahoney*, 70 Minn. 238; *Robinson v. Woodward*, 48 S. W. (Ky.) 1082; *New Farmers' Bank v. Cockrell*, 106 Ky. 578; *Jones v. Chesebrough*, 105 Iowa 303; *District Township v. Farmers' Bank*, 88 Iowa 194; *Bradley v. Chesebrough*, 111 Iowa 126; *Quin v. Earle*, 95 Fed. 728; *Beard v. Independent District*, 31 C. C. A. 562; *Pennell v. Deffell*, 4 De Gex, M. & G. (Eng.) 372. A depositor who receives a certificate of deposit is not entitled to priority, even though the bank promised to keep it by itself, if it is mingled with other funds. *Bayor v. American Trust & Sav. Bank*, 157 Ill. 62, affg. 51 Ill. App. 180. See also valuable note, 32 Am. St. Rep. 125.

60 *City of Lincoln v. Morrison*, 64 Neb. 822; *Billingsley v. Pollock*, 69 Miss. 759; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358; *Beard v. Independent District*, 31 C. C. A. 562. See Chap. XVII. §16.

its recovery is sought.⁶¹ The contrary view has been expressed,⁶² but is not favored.

Thus A bank sent a draft to B bank to be deposited to its credit. B bank owed C bank which collected the draft and applied, by instructions, the proceeds in reduction of the sender's indebtedness. The B bank was insolvent and ought not to have received the draft, nevertheless A bank failed to collect

61 *Freiberg v. Stoddard*, 161 Pa. 259, 261; *Sherwood v. Milford State Bank*, 94 Mich. 78; *People v. Merchants' & Mech. Bank*, 78 N. Y. 269; *Kansas State Bank v. First State Bank*, 62 Kan. 788; revg. 9 Kan. App. 839; *Burrows v. Johntz*, 57 Kan. 778; *Travellers' Ins. Co. v. Caldwell*, 59 Kan. 156; *Beard v. Independent District*, 31 C. C. A. 562; *Perth Amboy Gas Light Co. v. Middlesex Co. Bank*, 60 N. J. Eq. 84; *Jones v. Chesebrough*, 105 Iowa 303; *Bradley v. Chesebrough*, 111 Iowa 126, 136; *District Township v. Farmers' Bank*, 88 Iowa, 194, 199; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358. A check given by a depositor on his bank for the payment of a note in its possession does not impress a trust on his deposit when there is no money in the bank to be impressed by reason of its insolvency. *Sherwood v. Milford State Bank*, 94 Mich. 78. A wife had a savings bank deposit standing in the name of a trustee. After her death her husband procured a transfer from the trustee and withdrew a portion. Yet a bill in equity could not be sustained against her estate, after his death, to recover the money for, if it was a trust fund, it had been lost. *Hodge v. Hodge*, 90 Me. 505. Money borrowed of a bank by its cashier by means of an overdraft and used in building a house cannot be followed into it. *McElroy Bkg. Co. v. Dickson*, 66 Ark. 327. A grain commission broker was persuaded by a bank to give a check on a deposit that belonged to his customers in payment of an old indebtedness of a corporation of which he had been president. Nevertheless shippers of grain after the giving of the check could not impose a trust on the money obtained by that check for their benefit, as the money had not been derived from the sale of their property. *Boyle v. Northwestern Nat. Bank*, 103 N. W. (Wis.) 1123. A claim for damages against a corporation growing out of false representations in the sale of property is not entitled to a preference in the distribution of assets unless the fund has been preserved as a distinct increase to its assets that can be taken without impairing the rights of other creditors. *Seeley v. Seeley-Howe-Le-Van Co.*, 103 N. W. (Iowa) 961. The fact that the beneficiary has not entered into the relation of debtor and creditor with the trustee does not affect the question. So long as he seeks to recover what he can show to be his own, he is in the position of owner; but when he cannot do this, and seeks to recover payment out of the trustee's general estate he is in the position of a creditor. *Slater v. Oriental Mills*, 18 R. I. 352, 356.

62 In *Ryan v. Paine*, 6 Miss. 678, an individual sent a draft to a bank

the amount of B's receiver, because it had never received the money. Its action raised an implied trust for the recovery of the draft, or its proceeds from the B bank, but as the draft had been paid to another bank, neither the B bank nor its receiver received the money, consequently there was nothing in the possession of that bank to recover.⁶³

Another illustration of a larger series of cases may be mentioned. A bank received from a customer a check on B bank, which was sent to the drawee for payment. Before paying, the B bank failed. A bank then sought to impress a trust on the assets of the B bank for the amount. But the court denied relief on the ground that, to recover the amount, it must show that the B bank had set aside for its payment a fund having a real existence; that in charging the check to the drawer the bank simply reduced its indebtedness to him, and constituted itself a debtor to the holder of the draft for a corresponding amount; and that no fund was accumulated by this operation for paying the draft.⁶⁴

Another illustration, representing a long series of cases, may be mentioned. A depositor deposited with a bank for collection a check which was sent to the clearing-house and used in balancing the sender's indebtedness to other banks. When, therefore, the bank, later in the day, failed, the depositor had no claim against the bank for the check, or its proceeds, as trust property, because the bank had neither check nor proceeds in its possession. The depositor had simply a claim like other creditors of the bank for "conversion of the check, or of the money, its proceeds, and as such it stood on the same footing as any other

for collection, which the bank collected by taking the check of the debtor on itself. He had at that time no deposit in the bank, so his check was an overdraft, but he was solvent. The bank having failed before paying the draft, the court held that a trust existed in favor of the creditor for the sum due the bank in discharge of his overdraft.

63 *City Bank v. Blackmore*, 21 C. C. A. 514.

64 *People v. Merchants' & Mech. Bank*, 78 N. Y. 269; *Citizens' Bank v. Bank of Greenville*, 71 Miss. 271; *Peters Shoe Co. v. Murray*, 31 Tex. Civ. App. 259; *Citizens' Nat. Bank v. Dowd*, 35 Fed. 340.

claim upon the assigned assets based on a conversion of money or other property."⁶⁵

A court of equity will follow a fund diverted from the owner as far as it can be traced, and will enforce the true owner's rights against any property in which it may have been invested.⁶⁶ Indeed, he can reclaim it of any possessor except a bona fide purchaser or assignee for value without notice.⁶⁷

11. When Created is Presumed to Exist.

After the creation of a trust, the presumption is that the bank has the money until the contrary is shown.⁶⁸

12. Effect of Mingling With Mingler's Personal Fund.

In the search after a perverted trust fund the principle should not be overlooked that a depositor who mingles a trust fund with his own personal deposit, thereby raises a lien as between himself and his principal in favor of the beneficiary on the entire fund.⁶⁹ And this principle applies to a bank as well as an individual.⁷⁰

13. Is Not Lost Through Owner's Ignorance.

The beneficiary's ignorance of the perversion of his property, and also of its existence, does not prevent action after his discovery.⁷¹ And he may pursue the fund regardless of any security he may have in his possession.⁷² But there is one in-

65 In re Seven Corners Bank, 58 Minn. 5, 7; City of St. Paul v. Seymour, 71 Minn. 303.

66 State Bank v. Domestic Sewing Machine Co., 99 Va. 411.

67 Overseers v. Bank of Virginia, 2 Gratt. (Va.) 544, 548.

68 See Chap. XVII. §8; Independent District v. King, 80 Iowa 497; City of Lincoln v. Morrison, 64 Neb. 822; Sherwood v. Central Mich. Sav. Bank, 103 Mich. 109.

69 National Bank v. Insurance Co., 104 U. S. 54; City of Lincoln v. Morrison, 64 Neb. 822; Hutchinson v. National Bank, 41 So. (Ala.) 143.

Contra.—Little v. Chadwick, 151 Mass. 109.

70 Sherwood v. Central Mich. Sav. Bank, 103 Mich. 109.

71 Star Cutter Co. v. Smith, 37 Ill. App. 212; People v. City Bank, 96 N. Y. 32; City of Marquette v. Wilkinson, 119 Mich. 413; Allen v. Russell, 78 Ky. 105; Farmers & Traders' Bank v. Fidelity & Dep. Co., 108 Ky. 384, 387; Dowie v. Humphrey, 91 Wis. 98.

72 City of Marquette v. Wilkinson, 119 Mich. 413.

dispensable condition of recovery, the fund in some form must actually exist.⁷³ Therefore, from a bank that receives a deposit without knowing its real character and uses it, there can be no recovery, for it is no longer the possessor, and has been guilty of no wrong either in receiving or using it.⁷⁴ This not infrequently happens when an agent or public officer makes a deposit of the principal's money without informing the bank.

14. Nor by Diversion.

In no case does a trust fund lose its real character by the agent's or trustee's action in depositing the money to his own individual account.⁷⁵ An individual trustee in thus mingling a trust deposit with his own does wrong, and the depository, knowing this, should regard his conduct with great suspicion and act accordingly. It has often been said that trustees have a right to deposit trust funds to their individual account, and it is true that in some cases this is done with the principal's

⁷³ Cases in notes 59-61.

⁷⁴ *School District v. First Nat. Bank*, 102 Mass. 174; *Long v. Emsley*, 57 Iowa 11. See §18.

⁷⁵ *Leonard v. Latimer*, 67 Mo. App. 138; *Harrison v. Smith*, 83 Mo. 210; *Stoller v. Coates*, 88 Mo. 514; *Swift v. Williams*, 68 Md. 236; *Globe Sav. Bank v. National Bank*, 64 Neb. 443; *Manhattan Bank v. Walker*, 130 U. S. 267; *National Bank v. Insurance Co.*, 104 U. S. 54; *Gray v. Johnston*, L. R. 3 H. L. Cas. 1; *Keane v. Roberts*, 4 Madd. (Eng.) 20. "Executors and trustees must be made to understand that it is their duty to keep the funds of their trust separate from their other funds and business; that they should, upon no consideration, use the trust moneys themselves, or permit them to be mingled with their own moneys or property. In no other way can they save themselves from trouble, litigation and censure. If they neglect this obvious duty, they have no reason to complain if they meet with trouble and expense, and sometimes with heavy loss. The protection of the rights of those who are not in a situation to protect themselves, makes it the duty of courts of justice to require fiduciaries to make good all losses which have been occasioned by their neglect." Chancellor Walworth, *Case v. Abeel*, 1 Paige (N. Y.) 393, 402. In *People v. City Bank*, 96 N. Y. 32, 37, *Danforth, J.*, said: "The checks were impressed with a trust, and no change of them into any other shape could divest it so as to give the bank or its receiver any different or more valid claim in respect to them than the bank had before the conversion." Citing *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Dows v. Kidder*, 84 N. Y. 121.

knowledge and for his benefit.⁷⁶ These cases are exceptional and do not infringe the rule.

In like manner the true character of a trust fund is not lost by the agent's or trustee's wrongful retention or use.⁷⁷ Thus, if a check is given to a bank for collection only, and the proceeds are diverted to its own use, and it afterwards assigns, the owner's right of reclamation is not affected by the unauthorized act of the collector. He may, however, fail through inability to trace and identify his property.⁷⁸

Furthermore, a bank that receives a deposit under circumstances that ought to start the inquiry, whether the deposit is of an individual or trust character, that does not make the inquiry, nor explain satisfactorily why it has not done so, "must be charged with constructive and conclusive notice of the facts which would have been ascertained upon due inquiry."⁷⁹

15. Recovery from Replenished Fund.

When the general fund has been drawn below the amount of the trust fund and subsequently replenished, two opinions, as we have seen, prevail with respect to the beneficiary's right to the new accumulation.⁸⁰ If the bank were solvent, there is no reason why the beneficiary should not take the replenished fund; if insolvent, and he can clearly show that the accumulation was for him, then he can probably hold it unless he would thereby gain an illegal preference. But generally a new accumulation cannot be taken by him because he has no better right thereto than other creditors. In no case has he a superior equity over another creditor except to his own money. A new accumula-

⁷⁶ *State v. Thomas*, 53 Neb. 464. See *Goodwin v. American Nat. Bank*, 48 Conn. 550. See post, note 90.

⁷⁷ *Ibid*; *Meldrum v. Henderson*, 7 Colo. App. 256; *First Nat. Bank v. Hummel*, 14 Colo. 259; *Kansas State Bank v. First Nat. Bank*, 62 Kan. 788.

⁷⁸ *Meldrum v. Henderson*, 7 Colo. App. 256. See §17.

⁷⁹ *Jeffray v. Towar*, 63 N. J. Eq. 530; *Hay v. Bramhall*, 19 N. J. Eq. 563; *Tantum v. Green*, 21 N. J. Eq. 364.

⁸⁰ See Chap. VI. §9.

tion is not his own money, nor a substitute, save under the conditions above mentioned.⁸¹

16. Bank's Diversion of Fund to Pay Depositor's Debt.

While the law presumes that in drawing from such a mingled fund the depositor draws out his own individual fund first,⁸² this does not protect or shield a bank that permits him to pervert for his own use the money of his principal. Consequently, a bank that has improperly withdrawn the fund in payment of his indebtedness to the bank itself,⁸³ or for any other

81 If an agent deposits, for example, \$1,000 of his principal's funds to the credit of his own account, and afterward draws out a portion and still later makes a fresh deposit, the most that the principal can claim of the deposit as a trust belonging specifically to him is the portion left after the deposit had reached the lowest limit. *Boyle v. Northwestern Nat. Bank*, 125 Wis. 498.

82 *State v. Foster*, 5 Wy. 199; *City of Lincoln v. Morrison*, 64 Neb. 822; *Globe Sav. Bank v. National Bank*, 64 Neb. 413; *Burnham v. Barth*, 89 Wis. 362; *Importers and Traders' Nat. Bank v. Peters*, 123 N. Y. 272, 278; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Matter of Holmes*, 37 N. Y. App. Div. 15; *Wetherell v. O'Brien*, 140 Ill. 146; *Woodhouse v. Crandall*, 197 Ill. 104; *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206. revg. 57 Ill. App. 107; *Plano Mfg. Co. v. Auld*, 14 S. Dak. 512; *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696.

83 See Chap. XXV. §5; *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411; *National Bank v. Insurance Co.*, 104 U. S. 54; *State Bank v. McCabe*, 98 N. W. (Mich.) 20; *Farmers & Traders' Bank v. Fidelity & Dep. Co.*, 108 Ky. 384; *Bright v. King*, 45 S. W. (Ky.) 508; *Jaffray v. Towar*, 63 N. J. Eq. 530; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756 and 49 Neb. 125; *Rock Springs Nat. Bank v. Luman*, 6 Wy. 123; *Globe Sav. Bank v. National Bank*, 64 Neb. 413; *Nehawka Bank v. Ingersoll*, 2 Neb. (Unof.) 617; *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333; *American Trust & Banking Co. v. Boone*, 102 Ga. 202; *Mayer v. Citizens' Bank*, 86 Mo. App. 422, 425, and cases cited; *Johnson v. Payne & Williams Bank*, 56 Mo. App. 257; *York v. Farmers' Bank*, 79 S. W. (Mo. App.) 968, 971; *Bundy v. Town of Monticello*, 84 Ind. 119; *Bank v. Clapp*, 76 N. C. 482; *Commercial Bank v. Jones*, 18 Tex. 811; *Kimmel v. Bean*, 68 Kan. 607; *McNulta v. West Chicago Park Comrs.*, 40 C. C. A. 155; *Rochester Turnpike Co. v. Paviour*, 164 N. Y. 281, affg. 28 App. Div. 623. See *Hale v. Richards*, 80 Iowa 164 and lengthy note 52 L. R. A. 790. A bank cannot retain a deposit applied by a factor belonging to his principal to pay his overdrawn account. *Interstate Nat. Bank v. Claxton*, 80 S. W. (Tex.) 604. A bank that appropriates the deposit of an insurance company, by suffering the president and cashier to check out the company's money to pay their individual indebted-

improper purpose, can be compelled to refund to the true owner.⁸⁴

And if by the drawer's mistake the proceeds of a draft are credited by the discounting bank to an agent, instead of his

ness, must refund it. An attachment may be granted against the bank for a conversion of the money. *Kelsey v. Bank of Mansfield*, 85 N. Y. App. Div. 334; *Gerard v. McCormick*, 130 N. Y. 261; *Rochester Turnpike Co. v. Paviour*, 164 N. Y. 281. The public deposit of an officer cannot be applied by him, or the bank, to discharge his private debt. *Shepard v. Meridian Nat. Bank*, 149 Ind. 532; *Skipwith v. Hurt*, 94 Tex. 322; *Anderson v. Walker*, 93 Tex. 119; *Love v. Keowne*, 58 Tex. 191; *National Bank v. Investment Co.*, 74 Tex. 421; *Carroll Co. Bank v. Rhodes*, 69 Ark. 43, 48; *State v. Hobson*, 5 Ohio N. P. 321. The sureties on an officer's bond who have his shortage are subrogated to the rights of the county or other public body against the bank. *Skipwith case*, 94 Tex. 322; *Boon Co. Bank v. Byrum*, 68 Ark. 71; *Carroll Co. Bank v. Rhodes*, 69 Ark. 43. A deposit by a county treasurer to the credit of his trust of money previously borrowed from the bank on his individual note is a trust fund that is not subject to his individual check, nor to the lien of the bank for the money borrowed. *Custer Co. v. Walker*, 10 S. Dak. 594. The deposit of a corporation cannot be appropriated by a bank in payment of the private debt of an officer on a check signed by him for the corporation. *Kelsey v. Bank of Mansfield*, 85 N. Y. App. Div. 334; *Gerard v. McCormick*, 130 N. Y. 261; *Rochester Turnpike Co. v. Paviour*, 164 N. Y. 281; *James Reynolds Elevator Co. v. Merchants' Nat. Bank*, 55 N. Y. App. Div. 1; *Baker v. N. Y. Nat. Ex. Bank*, 16 Abb. N. C. 458; *First Nat. Bank v. National Broadway Bank*, 156 N. Y. 459, 467, 468; *Cohnfeld v. Tanenbaum*, 176 N. Y. 126, revg. 58 App. Div. 310; *Ferry v. Home Sav. Bank*, 114 Mich. 321; *Merchants' Nat. Bank v. Detroit Knitting Works*, 68 Mich. 620; *Manhattan Web Co. v. Acquidneck Nat. Bank*, 133 Fed. 76. See *Johnson v. Hersey*, 70 Me. 74. A joint deposit for a special purpose cannot be applied by the bank to pay the indebtedness of one of them. *Columbia Finance & Trust Co. v. First Nat. Bank*, 25 Ky. L. Rep. 561. A received a check payable to his order, endorsed it in blank, and delivered it to B, instructing him to obtain the money, and remit it to C. B endorsed the check in blank, presented it to the drawee bank which, after deducting B's indebtedness, paid him the balance. A recovered the sum thus deducted. *Percival v. Strathmore*, 112 Iowa 747.

84 *First Nat. Bank v. First Nat. Bank*, 58 Ohio St. 207; *Manhattan Bank v. Walker*, 130 U. S. 267. In *Butler Co. v. Boatmen's Bank*, 143 Mo. 13, 25, the deposit belonged to a county, which was known by the bank, yet it suffered the depositor to check it out and use it for his own purpose. The bank was liable therefor. Said the court: "The bank occupied to the county the relation of trustee and held the money as a trust fund which could only be applied to the payment of the [county obligations]. In such case the law is well settled that a misapplication of the

principal, the bank cannot afterward appropriate the money to extinguish the agent's indebtedness to itself.⁸⁵

17. Its Use to Pay Other Debts.

While a bank cannot take and retain trust money within the control of a depositor in payment of his private debt to the bank, it cannot forbid him from using it in paying his debts to others by refusing to honor his checks.⁸⁶ Says a western tribunal: "A banker is not required to protect the rights of third persons, or to initiate any inquiry between him and the customer."⁸⁷ This is generally true, yet on all occasions it is a dangerous doctrine to maintain, and courts may well hesitate to apply it to a bank having unquestioned knowledge that a depositor is perverting his trust for his own wrongful individual use.⁸⁸

funds would constitute a breach of the trust and the trustee would become answerable for all losses occasioned thereby."

The bank account of one as guardian was composed in part of money belonging to a corporation, of which the guardian was manager. Nevertheless, he had no right to divert any portion of the fund to the payment of the corporation's indebtedness, as the entire fund presumptively belonged to the beneficiary, of which the bank, by the signature of the checks of the drawer as guardian, had notice. *Cohnfeld v. Tanenbaum*, 176 N. Y. 126, revg. 58 App. Div. 310. If a bank advise an agent to deposit his principal's money in his own name, which is done, it is guilty of fraudulent conversion and an action may be maintained therefor against the bank. *Commercial Bank v. Jones*, 18 Tex. 811. A bank that permits an officer who is an agent of a depositor to transfer money from his principal's account to the credit of a concern in which it is known by the bank that he has a personal interest, is charged with knowledge of his perversion of the amount and is liable therefor. *National Bank v. Munger*, 36 C. C. A., 659; *Chrystie v. Foster*, 9 C. C. A. 606.

85 *First Nat. Bank v. Gatten*, 172 Ill. 625.

86 *Nehawka Bank v. Ingersoll*, 2 Neb. (Unof.) 617.

87 *Rock Springs Nat. Bank v. Luman*, 6 Wy. 123, 141; *Duckett v. National Mech. Bank*, 86 Md. 400, 406. A was the owner of the shares of a company, of which he was the managing director. He had a similar enterprise of his own. After a time he improperly transferred by check sums from the company's account to his individual account. The bank was under no duty "to inquire into the state of the accounts between the parties." *Bank of New South Wales v. Goulburn Valley Butter Co.*, 87 Law Times (N. S.) 88.

88 In *Rock Springs Nat. Bank v. Luman*, 6 Wy. 123, 142, the court,

In a case of unusual interest and importance a trustee had two checks given to him; one was payable to the order of the cashier of a bank "to deposit to the credit of C trustee." The other was payable to the order of the same cashier "for deposit to the credit of C being the balance of purchase money due him as trustee from D." Both were placed to the credit of the personal account of C, who drew out the money for his own use and lost it. The court held that the bank had knowledge of the nature of the first check and did wrong in crediting it to C's personal account. Although he might, had the deposit been properly made, have drawn out the money as trustee and afterward misapplied it without thereby involving the bank, this was no excuse for the wrong actually committed and it was responsible for the amount.⁸⁹

A general depositor, however, may deposit a check payable to him as trustee to his private account.⁹⁰ This is the rule, but the wisdom of maintaining it may be questioned.

18. When it May be Used to Pay Depositor's Debt.

To this rule, that a bank cannot apply trust money to pay

after declaring that a bank is liable for converting a trust fund to its own use, adds: "Otherwise, when the payment is made to a third person at the direction of the trustee, as in that case the bank becomes the mere channel or medium through which the misapplication is made."

89 *Duckett v. National Bank*, 86 Md. 400, 406, citing *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333; *State Nat. Bank v. Reilly*, 124 Ill. 464; *Chosen Freeholders v. Newark City Nat. Bank*, 48 N. J. Eq. 51; *Walker v. Manhattan Bank*, 25 Fed. 255. See this case in 130 U. S. 267; *Swift v. Williams*, 68 Md. 236. In the *Duckett* case the Maryland Court of Appeals said: "In the absence of notice or knowledge a bank cannot question the right of its customer to withdraw funds, nor refuse to honor his demands by check; and, therefore, even though the deposit be to the customer's credit in trust, the bank is under no obligation to look after the appropriation of the trust funds when withdrawn, or to protect the trust by setting up a *jus tertii* against a demand. But if the bank has notice or knowledge that a breach of trust is being committed by an improper withdrawal of funds, or if it participates in the profits or fruits of the fraud, then it will be undoubtedly liable."

90 *Batchelder v. Central Nat. Bank*, 73 N. E. (Mass.) 1024; *Ashton v. Atlantic Bank*, 85 Mass. 217; *Safe Deposit & Trust Co. v. Diamond Nat. Bank*, 194 Pa. 334.

the trustee's individual indebtedness to the institution, there is a noteworthy exception. If the bank did not know, so the courts have declared on many occasions, it can be retained.⁹¹ This rests on the ancient and crumbling doctrine that money has no earmarks. Why should not the bank be required to refund to the rightful owner in all cases wherein its situation would not be worse than it was before receiving payment? No rule is better established than this, that trust funds do not lose their character by reason of depositing them to the individual account of the depositor.⁹² If, therefore, they still possess this character, why should they not be recovered, provided they can still be traced, regardless of their possessor?

This exception to the ordinary rule, that applies to every other kind of property,⁹³ is so illogical that the courts are manifesting a healthy impatience to overthrow it. Accordingly, in

91 *Holly v. Missionary Society*, 180 U. S. 284; *Dike v. Drexel*, 11 N. Y. App. Div. 77, 82, 83; *Myers v. N. Y. County Nat. Bank*, 36 N. Y. App. Div. 482; *Justh v. National Bank*, 56 N. Y. 478; *Stephens v. Board of Education*, 79 N. Y. 183; *Southwick v. First Nat. Bank*, 84 N. Y. 434; *Hatch v. Fourth Nat. Bank*, 147 N. Y. 184; *Newhall v. Wyatt*, 139 N. Y. 452; *Hutchinson v. Manhattan Co.*, 150 N. Y. 250; *Goshen Nat. Bank v. State*, 141 N. Y. 379; *School District v. Bank*, 102 Mass. 174; *Wood v. Bank*, 129 Mass. 358; *First Nat. Bank v. City Nat. Bank*, 102 Mo. App. 357; *Safe Dep. & Trust Co. v. Diamond Nat. Bank*, 194 Pa. 334; *Smith v. Des Moines Nat. Bank*, 107 Iowa 620, reviewing many cases; *First Nat. Bank v. Valley State Bank*, 60 Kan. 621; *Sanborn v. First Nat. Bank*, 90 S. W. 1033, citing many cases; *Miller v. Race*, 4 Burr. (Eng.) 452. A bank that appropriates money collected by a depositor as agent for another without any knowledge of its ownership, to pay his debt to the bank, cannot be recovered therefrom by the principal. *London & River Plate Bank v. Hanover Nat. Bank*, 36 N. Y. App. Div. 487. An agent collected rents of property held by two persons in common and deposited the money to their credit by himself as agent and afterward drew the money out on a check drawn and signed in their names by himself. The bank not knowing the ownership of the fund beyond the record of the deposit, was protected in its action. *Carr v. Fidelity Bank*, 126 N. C. 186.

92 This is essentially the Michigan view. *Burnett v. First Nat. Bank*, 38 Mich. 630. The United States cannot hold, against the claim of an innocent beneficiary, a trust fund that has gone into the treasury through the fraud of its agent. *United States v. State Bank*, 96 U. S. 30.

93 *Breckenridge v. McAfee*, 54 Ind. 140, 141.

the more recent decisions,⁹⁴ courts have required banks to account for the money they have thus sought to apply in a wrongful manner.

In one of the recent cases the maker of a note diverted his employer's money to pay it. The money was received by the payee without the slightest suspicion of its source. Nevertheless he was not permitted to retain it against the true owner. "He received it," said the court, "from one who had no authority to dispose of it, and its appropriation to his own use was conversion. The payee's innocence and good faith afford no protection against the rightful owner, who has been tortiously dispossessed."⁹⁵

In Missouri the courts hold that the addition of the word agent, administrator, trustee and the like, to a person's account is no notice whatever to the bank that the deposit belongs to another.⁹⁶ The additional words are regarded merely as descriptive of the signer in harmony with the ancient rule that applied

94 Cases in 91.

95 *Porter v. Roseman*, 74 N. E. (Ind.) 1105. The court added that to charge the payee it was not essential for the true owner to trace his identical money into the payee's possession. It is sufficient to show that it went into his bank account.

96 *Sparrow v. State Ex. Bank*, 103 Mo. App. 338; *Eyerman v. Second Nat. Bank*, 84 Mo. 408, affg. 13 Mo. App. 289; *Mayer v. Columbia Sav. Bank*, 86 Mo. App. 108. To deposit money to one's credit as "trustee" is notice that it is trust money. *Bundy v. Town of Monticello*, 84 Ind. 119. That an agent asks for a certificate of deposit in his own name of money belonging to his principal is enough to put the bank on inquiry, especially if the president of the bank knew he was irregular and unworthy of confidence. *Farmers' Loan & Trust Co. v. Fidelity Trust Co.*, 86 Fed. 541. A bank that discounts a draft drawn by a customer payable to the order of an agent and permits him to credit the amount to his individual account, and draw against it, in the face of express instructions from the principal to cash only drafts and checks sent by himself, is liable for the wrongful diversion of the principal's money. *Heinz v. Fourth Nat. Bank*, 48 S. W. (Tenn.) 133. An executor who abuses his trust and diverts the fund in his possession for his own purpose does a great wrong; and a broker or other person who receives the money, knowing its true character, or under suspicious circumstances that ought to have led to inquiry before receiving it, is equally guilty and can be compelled to refund. *Marshall v. de Cordova*, 26 N. Y. App. Div. 615.

to them when used by the makers of notes and checks. Consequently, as a deposit thus made is that of the individual who made it, the deposit can be applied to the payment of his individual debt. The application, of course, is proper, if the deposit can be thus properly regarded. This is contrary to the rule prevailing perhaps in every other state;⁹⁷ it should be amended, for it is often in glaring violation of the truth, and sanctions a vicious and dangerous practice. The least that a bank should be permitted to presume in such cases is that the deposit does not belong to the depositor; and if, in truth, it does, that he should furnish clear evidence of the fact.

A bank may rightfully assume, unless possessing contrary knowledge, that the money deposited in the depositor's name belonged to him; and consequently that he had a right to draw it out. Therefore, if his successor in office should sue to recover the fund, claiming it was public or trust money, the burden of proof would be on him to establish its trust character.⁹⁸

19. Trust Money Thus Known by Solvent Bank Can Always be Recovered.

Whether the courts will continue to apply this principle so generally for the protection of banks that receive deposits regardless of their ownership, it is certain that a trust deposit received by a solvent bank knowing its true character can be recovered. Nor is its recovery conditioned in any way on its existence. Thus a bank which credits the account of a depositor with a forged check can follow the money into the possession of any one who received it with knowledge of the fraud.⁹⁹

97 In *Bundy v. Town of Monticello*, 84 Ind. 119, 130, a depositor added "trustee" to his name, and the question arose "whether this fact was notice of its character." The court said: "We think it was. The word trustee meant something. It was not merely *descriptio personæ*, but was a description of the fund deposited. It imported the existence of a trust and was notice of the character of the fund." *Shaw v. Spencer*, 100 Mass. 382; *National Bank v. Insurance Co.*, 104 U. S. 54.

98 *Woodbridge v. First Nat. Bank*, 45 N. Y. App. Div. 166.

99 *Fidelity Trust Co. v. Baker*, 60 N. J. Eq. 170. A having forged the endorsement of a check deposited it with A bank and was credited with the amount. He drew out \$2,400 by check which he sent to B bank and

20. Duty of Bank to Watch Depositor Who Has Diverted Trust Fund.

How far a bank should go in watching a depositor who is manipulating a trust fund, seemingly for his own benefit, is an important question, yet difficult to answer. That it cannot suffer with indifference a trust fund to be diverted and lost, has been often declared. In one of the later cases the duty is thus expressed: "No bank is made to exercise supervisory functions with its depositors. If knowledge comes to the bank that any agent, who is allowed to check upon the funds of his principal on deposit with it, is about to commit a breach of trust in drawing checks upon the fund in the bank, of course, in such an event it would be the duty of the bank to protect the rights of the principal; but, to acquire this knowledge, such a bank will not be required to exert itself beyond the channels of its business."¹ The judicial expression is quite varied, and if the particular case under investigation requires the application

had credited to an account from which he had wrongfully drawn, without the knowledge of the bank or the depositor, this amount. A bank attempted to recover the \$2,400 from the other bank, but did not succeed. *Nassau Bank v. National Bank*, 159 N. Y. 456, affg. 32 App. Div. 268.

1 *Pope, J., Merchants & Planters' Nat. Bank v. Clifton Mfg. Co.*, 56 S. C. 320, 338. See *Knobeloch v. Germania Sav. Bank*, 43 S. C. 233. "A depositor although holding the money in a fiduciary capacity, may draw it out of the bank ad libitum. The bank is bound to honor his checks, and incurs no liability in so doing so long as it does not participate in any malapplication of funds or breach of trust. The mere payment of the money to, or upon the checks of, the depositor, does not constitute a participation in an actual or intended misapplication by the fiduciary, although his conduct or course of dealing may bring to the notice of the bank circumstances that would enable it to know that he was violating his trust. Such circumstances do not impose upon the bank the duty, or give it the right to institute an inquiry into the conduct of its customer, in order to protect those for whom the customer may hold the fund, but between whom and the bank there is no privity." *Interstate Nat. Bank v. Claxton*, 97 Tex. 569. In three other important cases the same views have been expressed. *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333, 336; *Eyrich v. Capitol State Bank*, 67 Miss. 60, 72; *Gray v. Johnston*, L. R. 3 H. L. Cas. p. 14. A bank is responsible for the amount of a note payable to two trustees and endorsed by one for the other without his authority and deposited to his individual account and used. *Barroll v. Forman*, 88 Md. 188, 201.

of a severer rule, the views of the court are more strongly colored. When justice evidently requires more leniency, then the rule finally adopted is less severe. The duty of the bank therefore in such cases can never be clearly defined, and must depend to a considerable extent on the circumstances.

Thus no recovery can be had of a bank that lends money to an executor on the pledge of the securities of the estate, though the money is drawn out on a check made payable to his own order, and the money is appropriated to his own use.² Nevertheless, if the money is for some one else, would not the practice be far better to require the trustee to give the creditor a check; and, if the money is for the trustee himself, to require the bank to satisfy itself of the propriety of the payment before honoring his check? In like manner, ought not a receiving teller, who receives a check from a trustee made payable to him officially and endorsed by him for deposit on his own personal account, to make inquiry concerning the transfer?³ In some states this is wrong; it ought to be thus held everywhere.

Unquestionably a bank is not required to follow the use of a fund withdrawn by an agent or other trustee on adequate authority. Thus an agent had authority to "endorse and sign checks and deposit money, and make drafts for the use of the company," of which the drawee bank had knowledge. He drew out money "pay to the order of cash," and retained the money. In an action against the bank, the court said: "The authority to sign checks for the use of the company imposed no affirmative duty on the bank to inquire into the purpose of the check, or to the use to which the money was to be put."⁴ In another case a partner checked out partnership money in the partner-

2 Lyman v. National Bank, 181 Mass. 437. See Ch. VII. §11.

3 Duckett v. National Mech. Bank, 86 Md. 400; American Bonding Co. v. Nat. Mech. Bank, 97 Md. 598; Bundy v. Town of Monticello, 84 Ind. 119; American Ex. Nat. Bank v. Loretta Mining Co., 165 Ill. 103. In Safe Dep. & Trust Co. v. Diamond Nat. Bank, 194 Pa. 334, the court thought otherwise.

4 Warren Scharf Asphalt Pav. Co. v. Commercial Nat. Bank, 38 C. C. A. 108. See Nehawka Bank v. Ingersoll, 2 Neb. (Unof.) 617.

ship name and applied it to his individual use, yet the bank was declared to be not liable to the other members unless there was on its part a fraudulent purpose, or actual knowledge of the checking partner's fraudulent design.⁵

21. Recovery of Interest.

When trust money has been invested, the beneficiary can claim the profit on the investment.⁶ And the same rule applies to a bank that has improperly appropriated trust money to pay the trustee's individual debt to itself.⁷

22. Mode of Procedure by Owners.

The true owner can demand payment, and if the bank refuses, can recover by legal process, as for money had and received.⁸ To maintain the action privity of contract with respect to the money need not be shown, but only that in equity and good conscience the money belongs to the claimant.⁹ If the bank is insolvent, then he may fail to recover, not by reason of any flaw in his ownership, but through failure to satisfy the law of the existence of the fund belonging to him.¹⁰

Of course, when the beneficiary cannot recover the trust

5 *Eyrich v. Capitol State Bank*, 67 Miss. 60.

6 *City of Lincoln v. Morrison*, 64 Neb. 822; *Farmers & Traders' Bank v. Kimball Milling Co.*, 1 S. Dak. 388; *Brown v. Rickets*, 4 Johns. Ch. (N. Y.) 303; *Frank's Appeal*, 59 Pa. 190; *Butler v. Hicks*, 11 Sm. & M. (Miss.) 78; *York v. Farmers' Bank*, 79 S. W. (Mo. App.) 968. See *Parsons v. Treadwell*, 50 N. H. 356, 365, and cases cited.

7 *American Trust & Bkg. Co. v. Boone*, 102 Ga. 202. At least from the date of the action. *Marshall v. de Cordova*, 26 N. Y. App. Div. 615. See Chap. XXXI. §7c.

8 *York v. Farmers' Bank*, 79 S. W. (Mo. App.) 968; *Johnson v. Bank*, 116 Mo. 558.

9 *Deal v. Mississippi Co. Bank*, 79 Mo. App. 262. To recover public money from a bank misappropriated by a public officer with the bank's knowledge, it is not necessary for the public owner of the money to obtain a preliminary judgment therefor against the officer. *Harrison County v. State Sav. Bank*, 103 N. W. (Iowa) 121.

10 *Farmers & Traders' Bank v. Fidelity & Dep. Co.*, 108 Ky. 384.

fund, he can prove his claim as a general creditor.¹¹ On the other hand, a trust fund is not a claim within the meaning of the statutes pertaining to claims against assigned estates that must be presented, otherwise their collection cannot be enforced.¹²

11 Dowie v. Humphrey, 91 Wis. 98.

12 Myers v. Board of Education, 51 Kan. 87

